IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA

MYLAN PHARMACEUTICALS INC.,

Plaintiff,

v. No. 1:02CV88

(Judge Keeley)

AMERICAN SAFETY RAZOR COMPANY; MEGAS BEAUTY CARE, INC., D/B/A PERSONNA MEDICAL; BBA U.S. HOLDINGS, INC.; BBA NONWOVENS SIMPSONVILLE, INC.,and INTERNATIONAL PAPER COMPANY, individually and d/b/a VERATEC,

Defendants.

ORDER DENYING DEFENDANT INTERNATIONAL PAPER'S MOTION TO DISMISS OR TRANSFER

This matter comes before the Court on Defendant International Paper Company's Motion to Dismiss or Transfer. The motion is fully briefed and ripe for review. For the reasons that follow, the Court **DENIES** the motion.

Background.

Plaintiff Mylan Pharmaceuticals, Inc. (Mylan) bought 10 lots of defective pill-bottle cotton balls from Defendant American Safety Razor Company (ASR), which supplied the cotton through its division, Megas Beauty Care d/b/a Personna Medical (Personna). Personna obtained the cotton from Defendant International Paper Company (IP) through its Veratec division. In July 1998, IP sold

Veratec to Defendants BBA Nonwovens Simpsonville and BBA U.S. Holdings (together, BBA Nonwovens), thus making BBA Nonwovens Personna's new cotton supplier (via Veratec).

The complaint alleges that, in mid-1998, Personna requested that Veratec treat its cotton with extra hydrogen peroxide. Personna then used some of this treated cotton to fill Mylan's orders. Allegedly, the treatment made the cotton unfit for pharmaceutical use. In early March 1999, Personna finally informed Mylan that specific lots of cotton had been treated with the hydrogen peroxide and that Mylan should act accordingly. Mylan investigated and discovered that much of the affected cotton had already been used in pill bottles and had damaged the drugs inside.

Mylan now seeks damages for the defective cotton, asserting that all the Defendants knew about its needs and therefore breached actual or implied contracts.

BBA Nonwovens has asserted cross claims for indemnification and contribution against ASR, Personna, and IP. ASR has asserted cross claims for indemnification and contribution against BBA Nonwovens and IP. Personna has asserted cross claims for indemnification and contribution against BBA Nonwovens and IP. IP has asserted cross claims for indemnification and contribution against ASR and Personna; IP has carefully avoided asserting any cross claims against BBA Nonwovens.

IP now moves to dismiss BBA Nonwovens' cross claim against it, or, alternatively, to transfer the claim to the Southern District of New York. IP bases its motion entirely upon the presence of a forum selection clause contained in an Amended and Restated Purchase Agreement entered into in April 1998 between IP and the BBA Nonwovens entities. The Forum selection clause in the Amended and Restated Purchase Agreement states:

> Seller and each Member of Buyer Group (a) agree that any suit, action or proceeding arising out of or relating to this Agreement shall be brought solely in the state or federal courts of New York; (b) consents to the exclusive jurisdiction of each such court in any suit, action or proceeding relating to or arising out of this Agreement; (c) waives any objection which it may have to the laying of venue in any such suit, action or proceeding in any such court; and (d) agrees that service of any court paper may be made in such manner as may be provided under applicable laws or court rules governing service of process.
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> . . .
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> This Agreement will be governed by, and construed and enforced in accordance with, the laws of the State of New York (regardless of the laws that might otherwise govern under applicable principles of conflicts of laws thereof) as to all matters, including but not limited to matters of validity, construction, effect, performance and remedies.

The parties do not contest the validity of the forum selection clause.

Motion to Dismiss.

IP facially brings its motion to dismiss under Federal Rules of Civil Procedure 12(b)(1), 12(b)(2), 12(b)(3), and 12(b)(6). However, IP does not structure its argument under any of these sections, but rather makes the assumption that the Court should simply enforce a valid forum selection clause and dismiss the cross claim.

This approach does not rest well with the Supreme Court's ruling in Stewart v. Ricoh Corp., 487 U.S. 22, 29 (1988) (holding that motions to transfer based on a forum selection clause are to be dealt with under standards established by Congress in 29 U.S.C. § 1404, with the forum selection clause receiving its proper, but not controlling, weight in the statutory factor analysis). While academics continue to debate the proper vehicle for effectuating forum selection clauses, see Silva v. Encyclopedia Britannica, Inc., 239 F.3d 385, 388 n.3 (1st Cir. 2001) (outlining debate), the parties have not raised this issue, and the Court concludes that the best approach in this case is that touched upon in M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972):

> The argument that such clauses are improper because they tend to 'oust' a court of jurisdiction is hardly more than a vestigial legal fiction. It appears to rest at core on historical judicial resistance to any attempt to reduce the power and business of a particular court and has little place in an

> era when all courts are overloaded and when businesses once essentially local now operate in world markets. It reflects something of a provincial attitude regarding the fairness of other tribunals. No one seriously contends in this case that the forum selection clause 'ousted' the District Court of jurisdiction over Zapata's action. The threshold question is *whether that court should have exercised its jurisdiction* to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause.

407 U.S. at 12 (emphasis added). Thus, the presence of a forum selection clause allows the district court to decline the exercise of jurisdiction it otherwise possesses.

Forum selection clauses are presumptively enforceable absent a strong showing that the clause should be set aside or not enforced because the circumstances would render it "unreasonable." M/S Bremen, 407 U.S. 1 (establishing rule). Forum selection clauses can be unreasonable where there is a possibility of prejudice to the parties through conflicting judgments by the concurrent litigation in two courts, or when forcing them to refile subordinate claims in a separate court would be a gross waste of the parties' and the court's resources. See Taylor Investment Corp. v. Weil, 169 F. Supp. 2d 1046, 1061 (D. Minn. 2001); Ace Novelty, Inc. v. Vijuk Equip., Inc., 1991 WL 150191, at *7 (N.D. Ill. July 31, 1991).

IP argues that the forum selection clause sub judice was entered into fairly, is valid, and that enforcement is reasonable. IP states that the parties considered the relative convenience of the negotiated venue, both West Virginia and New York encourage enforcing such agreements, and the consequences of enforcing the forum selection clause were foreseeable at the time of formation. In support of its position, IP cites two unpublished cases that purportedly dismiss cross claims on the basis of a forum selection clause: TMC Co., Ltd. v. M/V Mosel Bridge, 2002 WL 1880722, at *1-2 (S.D.N.Y. Aug. 15, 2002); and U.S. Fid. & Guar. Co. v. Petroleo Brasiliero, 2001 WL 300735, at *16 (S.D.N.Y. Mar. 27, 2001). Both are distinguishable from this case.

TMC was an action for damages resulting from the thawing of a cargo of frozen beef that was shipped from California to Japan. 2002 WL 1880722 at *1. The actual shipping agent moved to dismiss both a cross claim against it and the amended complaint on the basis of a forum selection clause contained in the shipping agreement, which required litigation in Japan. Id. The court granted the motion, and the defendant shipping agent was dismissed from the action entirely. Id. at *2.

In the present case, IP seeks to dismiss only BBA Nonwovens' cross claim. Even if IP is successful, it will remain in this Court to answer Mylan's complaint and the cross claims filed by ASR

and Personna. Thus, assuming BBA Nonwovens will refile its cross claim in the Southern District of New York, IP's request creates an issue of judicial inefficiency that was not present in the TMC case.

In U.S. Fidelity, the court enforced the forum selection clause with respect to a single cross claim. 2001 WL 300735 at *16. In doing so, the court specifically noted that it "is possible to conceive of situations where there may be a strong public policy overcoming a forum selection clause, based on the interests of fairness, convenience to the parties, and judicial economy when all of the issues were otherwise being litigated before the court." Id. (citing Nippon Fire & Marine Ins. Co. v. M/V Springwave, 92 F. Supp. 2d 574, 577 (E.D. La. 2000) (declining to enforce a forum selection clause where the same facts and same legal theories would be litigated against the same party by other parties who were not parties to the forum selection clauses)). The case before the court presented a key mitigating circumstance: the court before which the dismissed cross claim would be refiled, Brasil, already had a related case on its docket. Id. Therefore, the dismissal did not create any inefficiency in the use of judicial resources. Id.

The exception noted in U.S. Fidelity applies in the present case. If dismissed, BBA's cross claim would be refiled in the

Southern District of New York, which currently does not have any related litigation on its docket. A further waste of judicial resources would occur should the Southern District of New York transfer the newly filed independent action back to this district where many other related claims are already pending. See Savin v. CSX Corp., 657 F. Supp. 1210, 1213 (S.D.N.Y. 1987) (transferred a case subject to a valid Forum selection clause to district not approved in Forum selection clause where related complex securities litigation was pending for over 10 years). Furthermore, the cross claim at issue is one for contribution and indemnification, a subordinate claim that cannot be addressed until the main issue of liability is resolved. Finally, both BBA Nonwovens and IP will remain in this case whether or not the cross claim is dismissed.

Dismissing the cross claim and forcing the parties to refile in New York would not only increase their own costs, but also force the Southern District of New York to expend its resources in handling the case, by either letting it remain on its docket until this action is resolved, or, as discussed above, transferring it back to this Court. Such an exercise would be a gross waste of the parties' and the Court's resources. Enforcement of the forum selection clause is therefore unreasonable.

Motion to Transfer.

IP alternatively requests that the Court transfer BBA Nonwovens' cross claim to the Southern District of New York. 28 U.S.C. § 1404(a) states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

Section 1404(a) only authorizes the transfer of an entire action, not individual claims. TechnoSteel, LLC v. Beers Const. Co., 271 F.3d 151, 157 (4th Cir. 2001) ("courts have adhered to the general rule that § 1404 transfer 'contemplates a plenary transfer of the entire case'"); see also Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1518 (10th Cir. 1991) (same) (citing Wyndham Assoc. v. Bintliff, 398 F.2d 614, 618 (2d Cir. 1968); 15 Moore's Fed. Prac. & Proc., § 3846 at 363)).

Individual claims can be transferred only if they are first severed under Federal Rule of Civil Procedure 21. Id. IP cites no cases supporting the transfer of a single subordinate claim, and does not ask that the Court sever the cross claim. Also, for the reasons set forth in the previous section, transferring this cross claim to the Southern District of New York would be a gross inconvenience for all involved.

Conclusion.

Exercising the Court's discretion to give effect to the forum selection clause and dismiss BBA Nonwovens' cross claim against International Paper would be unreasonable in this case. The Court, therefore, **DENIES** International Paper's Motion to Dismiss. Transfer of the cross claim alone is not permitted under the Federal Rules of Civil Procedure, and to do so would be an inconvenience for the parties. Accordingly, the Court also **DENIES** International Paper's alternative Motion to Transfer.

IT IS SO ORDERED.

The Clerk is directed to transmit copies of this Order to counsel of record.

DATED: December 12, 2002

Irene M. Keeley
IRENE M. KEELEY
UNITED STATES DISTRICT JUDGE

Slip Copy
2002 A.M.C. 2355
(Cite as: 2002 WL 1880722 (S.D.N.Y.))

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United States District Court, S.D. New York.

TMC CO., LTD., Plaintiff,
v.
M/V MOSEL BRIDGE, etc., et al., Defendants.

No. 01 CIV.9860 LAK.

Aug. 15, 2002.

Upon motion to dismiss the complaint and the cross-claims asserted in suit arising from damage to cargo shipped from California to Japan, the District Court, Kaplan, J., held that forum selection clause in the way bill was enforceable.

Motions denied.

Opinion, 2002 WL 1813301, superceded.

Shipping ⇦0

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Forum selection clause in way bill was enforceable in suit arising from damage to cargo shipped from California to Japan; forum selection clause in the way bill was mandatory and was not superseded by a subsequent service contract between carrier and non-vessel operating common carriers that booked the shipment since terms were not inconsistent, and, even if terms were inconsistent, they would not bind shipper, which was not party to the service contract.

AMENDED ORDER

KAPLAN, District J.

*1 This is an action for damages allegedly incurred by plaintiff as a result of thawing and other mishaps that befell a cargo of chilled beef shipped aboard the M/V MOSEL BRIDGE from Oakland, California, to Osaka, Japan. The shipment was performed pursuant to a waybill issued by defendant Kawasaki Kisen Kaisha, Ltd. ("K Line") to defendant Nippon Express USA (Illinois), Inc. ("Nippon Express"). The other named defendant is Nippon Express USA, Inc., evidently an affiliate of Nippon Express. It appears that one or both of the Nippon entities was a non-vessel operating common carrier that booked the shipment on the K Line. In any case, they have cross-claimed against K Line for any liability they may have to the plaintiff. K Line now moves to dismiss the amended complaint and the Nippon cross-claim on the ground that a forum selection clause allegedly incorporated by reference into the way bill is mandatory and requires that any suit against it be brought in Japan.

The way bill provided in relevant part that "[u]nless otherwise set out on the face and back hereof, the Goods to be carried subject to the terms and conditions provided for on the back of Carrier's BILL OF LADING (Standard Form For Container Trades) and to the terms and conditions of Carrier's applicable tariff ..." The form of bill of lading provided in relevant part that "[t]he contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and *any action thereunder shall be brought before the Tokyo District Court in Japan,* to whose jurisdiction Merchant irrevocably consents." (Johnson Decl. ¶ ¶ 6-7 & Exs. A-B) (emphasis added).

Forum selection clauses such as this are presumptively valid and enforceable. *E.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer,* 515 U.S. 528, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995). Plaintiff nevertheless resists dismissal on two grounds unique to it and one shared by the Nippon entities.

Plaintiff's contention that the clause is unreasonable rests on the proposition that "there is a risk that the Japanese Court will interpret [certain] bill of lading clauses as limiting liability in violation of Section 1308(8) of COGSA" (Pl.Mem.7), an utterly speculative supposition and one entitled to no weight here. This Court is entitled to, and does, assume that the courts of Japan will apply the applicable law in a balanced, appropriate manner.

The contention that the forum selection clause is permissive is irreconcilable with its plain language. "[S]hall be brought before the Tokyo District Court in Japan" means exactly what it says. It does not mean "may be brought before the Tokyo District Court in Japan" as well as anywhere else plaintiff might care to sue.

Plaintiff and the Nippon entities contend also that the forum selection clause in the way bill has been superseded by a 1999 service contract between K Line and Nippon Express, which recites that it "supersedes any other agreement and contains its own forum selection clause, which provides for arbitration under the Rules of the Society of Maritime Arbitrators before a single arbitrator appointed by this Court. [FN1] The difficulties with this argument are clear.

> FN1. The clause also contains a submission to the jurisdiction of this Court and permits confirmation of the award "in any court of competent jurisdiction."

***2** To begin with, Article VIII of the service contract provides that: "[A]ll terms and conditions (front and back) of Carrier's applicable Bill of Lading form, as effective upon cargo receipt and as contained in Carrier's Tariff at the time of receipt, shall apply to all shipments hereunder, *notwithstanding any term of this Contract.*" (Emphasis added) Thus, the service contract itself makes clear that any forum selection clause in any subsequently issued bill of lading would trump the one it contained itself.

The contention of plaintiff and Nippon Express would fail even if Article VIII were ignored. The way bill was issued in 2000; the service contract preceded it. The service contract therefore could not possibly have superseded the way bill. Indeed, "[a] second contract of a later date than an earlier contract containing the same subject matter, but containing terms inconsistent with the former contract, will supersede the former contract even though there is no express agreement that the new contract shall have that effect." *Decca Records v. Republic Recording Co.,* 253 F.2d 360, 363 (6th Cir.1956). *Accord, GCIU Employer Retirement Fund v. Chicago Tribune Co.,* 66 F.3d 862, 866 (7th Cir.1995); *Wiley v. Dixie Oil Co.,* 43 F.2d 51, 52 (10th Cir.1930); *K & V Scientific Co., Inc. v. Bayerische Motoren Werke Aktiengesellschaft ("BMW"),* 164 F.Supp.2d 1260, 1263 (D.N.M.2001) ; RESTATEMENT (SECOND) OF CONTRACTS § 279 and cmt. a. Accordingly, the forum selection clause in the way bill, which postdated and is flatly inconsistent with that in the service contract, would have superseded the latter with respect to the cargo at issue in this case even in the absence of Article VIII.

Finally, there is no basis for supposing that the 1999 service contract between K Line and Nippon Express binds plaintiff who, so far as the record discloses, was a stranger to that agreement.

For the foregoing reasons, the motion to dismiss the amended complaint and the cross-claims as against K Line is granted in all respects.

SO ORDERED.

2002 WL 1880722 (S.D.N.Y.), 2002 A.M.C. 2355

END OF DOCUMENT

2001 WL 300735
(Cite as: 2001 WL 300735 (S.D.N.Y.))

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Only the Westlaw citation is currently available.

United States District Court, S.D. New York.

UNITED STATES FIDELITY & GUARANTY COMPANY and AMERICAN HOME ASSURANCE,
Plaintiffs,
v.
PETROLEO BRASILEIRO S.A.--PETROBRAS, et al., Defendants.

No. 98 CIV 3099 JGK.

March 27, 2001.

OPINION AND ORDER

KOELTL, District J.

***1** This case arises out of the defaults that were declared on the construction of two multi-million dollar oil projects in Brazil. The plaintiffs, United States surety companies, issued payment and performance bonds in connection with the projects. In this action, the plaintiffs seek specific performance and damages from the defendants, including the construction contractors on the projects, who allegedly breached their obligations to the plaintiffs pursuant to various bonds and indemnification agreements relating to the projects.

This court has previously denied a motion to dismiss this case, *see United States Fidelity and Guarantee Co. v. Petroleo Brasileiro S.A.-Petrobras,* No. 98 Civ. 3099, 1999 WL 307642 (S.D.N .Y. May 17, 1999), as well as motions to dismiss a companion case. *See United States Fidelity and Guaranty Co. v. Braspetro Oil Serv. Co.,* No. 97 Civ. 6124, 1999 WL 307666 (S.D.N.Y. May 17, 1999). The Court of Appeals for the Second Circuit affirmed the orders denying the motions to dismiss. *See United States Fidelity and Guaranty Co. v. Braspetro Oil Serv. Co.,* 199 F.3d 94 (2d Cir.1999). Familiarity with those decisions is assumed.

The plaintiffs, United States Fidelity and Guaranty Co. ("USF & G") and American Home Assurance Co. ("AHAC") (collectively the "Sureties") issued two performance bonds (the "P-19 Bond" and the "P-31 Bond") which guaranteed the construction of two oil production facilities in Brazil, known as the P-19 Project and the P-31 Project. In this action, the Sureties have sued Petrobras Brasileiro S.A.-Petrobras ("Petrobras"), a Brazilian corporation, a majority of whose shares are held by the Brazilian Government, and which was created to advance the Brazilian Government's monopoly over the oil industry in Brazil. The Sureties have also sued various corporations, including construction contractors on the P-19 and P-31 Projects, namely Sequip Participacoes S.A. ("Sequip"), Industrias Verolme-Ishibras S.A. ("IVI"), IVI International, Ltd. S.A. ("IVI International"), Sade Vigesa S.A. ("Sade"), and SV Engenharia S.A. ("SV") (collectively the "IVI Group"). Other defendants are Sade Vigesa of America, Inc. ("Sade America"), Sade Vigesa (Chile) S.A. ("Sade Chile"), Internacional de Engenharia S.A. ("IESA"), Inepar Administracao E Participacoes S.A. ("Inepar A & P"), Inepar Industria E Construcoes S.A. ("Inepar I & C"), and Sade Vigesa Industrial E Servicos S.A. ("Sade Vigesa I & S"). The primary thrust of the Sureties' claims in this action is that, to the extent that the Sureties are liable for any losses or expenses on the P-19 and P-31 Projects, then the defendants are liable to them for such losses. [FN1]

> FN1. In the companion declaratory judgment action filed by the Sureties, *see Braspetro Oil,* 1999 WL 307666, the Sureties seek declaratory relief regarding their obligations, if any, on the P-19Bond and the P-31 Bond.

Defendant IVI filed a third-party action against Marubeni America Corporation ("MAC"), in which IVI seeks to prevent MAC from seeking payment under a payment bond issued by the Sureties in connection with the P-19 Project and referred to as the "MAC Payment Bond." IVI also seeks damages from MAC.

***2** The IVI Group defendants also brought various cross-claims against Petrobras in which they assert wrongdoing by Petrobras and Brasperto Oil Services Company ("Brasoil"), a wholly owned subsidiary of Petrobras. [FN2] The IVI Group alleges that because of numerous acts of alleged

wrongdoing by Petrobras/Brasoil in connection with the P-19 and P-31 Projects, the IVI Group's performance of its contracts in connection with those Projects was obstructed, leading to the damage or destruction of the business of the IVI Group.

> FN2. Brasoil, a defendant in the companion action, is not a party to this case. The IVI Group, however, alleges in its cross-claims that Petrobras was and is the alter-ego of Brasoil and refers to both entitites together. (IVI Group Am. Answer ¶ 163.) In addition, Petrobras maintains that it was specifically retained by Brasoil to act as Brasoil's express and disclosed agent for all purposes under the P-19 and P-31 Projects. (IVI Group Am. Answer ¶ 301.) Thus, for purposes of discussing the IVI Group's cross-claims, except where otherwise indicated, Petrobras and Brasoil will be referred to collectively as "Petrobras/Brasoil." In addition to the IVI Group's cross-claims, there are various other cross-claims between the various parties. Those cross-claims, however, are not the subject of any of the motions currently pending before the Court.

Four motions are now pending before the Court:

1. Defendant MAC moves pursuant to Fed.R.Civ.P. 12(b)(6) to dismiss IVI's third-party complaint for failure to state a claim. [FN3]

> FN3. MAC also moved, in the alternative, to dismiss or stay this action pending the final outcome of a related New York State Court proceeding ("State Court Action") based on parallel proceedings abstention grounds. Since this motion was filed, however, the New York State Supreme Court, Appellate Division, First Department, affirmed the state trial court's decision granting summary judgment in favor of MAC. *See Marubeni America Corp. v. United States Fidelity and Guaranty Co.,* Nos. 3162, 3163, 3163A, 2001 WL 83478 (N.Y.App.Div. Feb. 1, 2001). Because the Sureties have no further appeal options as a matter of right, the State Court action is concluded and no longer pending, thus there is no basis to dismiss or stay the third party action against MAC on parallel proceedings abstention grounds.

2. Defendant Petrobras moves pursuant to Fed.R.Civ.P. 12(c) to dismiss the IVI Group's cross-claims on the basis of forum selection clauses contained in the contracts between Petrobras/Brasoil and the IVI Group and, in the alternative, on the grounds that the cross-claims fail to state a claim.

3. Defendant Petrobras moves pursuant to Fed. R. Civ. 12(c) to dismiss certain of the Sureties' claims for failure to state a claim.

4. The IVI Group cross-moves to consolidate this action with the companion action, 97 Civ. 6124(JGK), pursuant to Fed. R. Civ P. 42(a).

I.

The same standards apply to a Rule 12(c) motion for judgment on the pleadings and to a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. *See Narvarte v. Chase Manhattan Bank, N.A.,* 969 F.Supp. 10, 11 (S.D.N.Y.1997). The Court "must view the pleadings in the light most favorable to, and draw all reasonable inferences in favor of, the nonmoving party." *Davidson v. Flynn,* 32 F.3d 27, 29 (2d Cir.1994); *see also Madonna v. United States,* 878 F.2d 62, 65 (2d Cir.1989); *National Ass'n of Pharmaceutical Mfrs., Inc. v. Ayerst Labs.,* 850 F.2d 904, 909 n. 2 (2d Cir.1988) (indicating that the Court treats a motion for judgment on the pleadings as if it were a motion to dismiss); *Slavsky v. New York City Police Dep't,* 967 F.Supp. 117, 118 (S.D.N.Y.1997), *aff'd,* 159 F.3d 1348 (2d Cir.1998) . A court should not dismiss a complaint unless it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claim that would entitle them to relief. *See Valmonte v. Bane,* 18 F.3d 992, 998 (2d Cir.1994) (citing *Conley v. Gibson,* 355 U.S. 41 (1957)). In deciding the motion, the Court can consider documents referenced in the complaint and documents that are in the plaintiffs' possession or that the plaintiffs knew of and relied on in bringing suit. *See Brass v.*

American Film Technologies, Inc., 987 F.2d 142, 150 (2d Cir.1993); *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991); *I. Meyer Pincus & Assoc., P.C. v. Oppenheimer & Co., Inc.*, 936 F.2d 759, 762 (2d Cir.1991); *Skeete v. IVF America, Inc.*, 972 F.Supp. 206, 208 (S.D.N.Y.1997). The Court can also consider "matters of which judicial notice may be taken." *See Leonard F. v. Israel Discount Bank of New York*, 199 F.3d 99, 107 (2d Cir.1999) (quotation omitted); *see also Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir.1991). Thus, the Court may consider certain of the various documents incorporated by reference and attached as exhibits to these motions. [FN4]

FN4. The parties attached various exhibits and affidavits to their briefs on the motions that are not incorporated by reference and of which judicial notice may not be taken. The Court may exclude the additional material and decide the motions on the pleadings alone or it may convert the motions to summary judgment motions under Fed.R.Civ.P. 56 and afford all the parties the opportunity to present supporting material. *See* Fed.R.Civ.P. 12(c) . The Court declines to convert the motions to summary judgment motions and the additional materials that were not incorporated by reference or were matters of which judicial notice could not be taken have been excluded.

II.

***3** For purposes of the pending motions, the following allegations are assumed to be true. The plaintiffs, USF & G and AHAC, are American sureties. USF & G is incorporated under the laws of Maryland. (First Am. Compl. ¶ 1.) AHAC is a New York corporation. (First Am. Compl. ¶ 2.) Petrobras is a Brazilian corporation which is majority owned by Brazil and which was created to serve as the executor of Brazil's monopoly of its national oil industry. (First Am. Compl.¶ 3.) Brasoil is a Cayman Islands corporation engaged in the oil business and is a wholly owned subsidiary of Petrobras. (Companion Action Am. Compl. ¶ 4.) Defendant IVI International is a Delaware corporation with its principal place of business in Texas. (First Am. Compl. ¶ 9.) Defendant Sade America is a Delaware corporation with its principal place of business in Florida. (First Am. Compl. ¶ 7.) Defendants Sequip, IVI, Sade, Inepar A & P, Inepar I & C, SV, Sade Vigesa I & S, and IESA are all Brazilian corporations. (First Am. Compl. ¶¶ 4-6, 10-14.) Defendant Sade Chile is a Chilean corporation. (First Am. Compl. ¶ 8). The remainder of the defendants are unnamed subsidiaries, affiliates, successors, assigns or associated companies or corporations of Sequip, Sade, Sade America, Sade Chile, Inepar A & P, and/or Inepar I & C. (First Am. Compl. ¶ 15.) Third-party defendant MAC is a New York corporation with its principal place of business in New York. (IVI Group Am. Answer ¶ 191.)

On September 16, 1994, Petrobras advertised International Bid Tender No. 821- 9-002-94 with respect to the P-19 Project, which concerned the purchase of a semi-submersible drilling platform and its conversion into a semi-submersible production platform ("the Rig"). (IVI Group Am. Answer ¶ 173; Declaration of Howard L. Vickery dated May 17, 2000 ("Vickery Decl."), Ex. 28.) [FN5] The International Bid Tender incorporated and referenced other documents, which made representations and warranties to prospective bidders. (IVI Group Am. Answer ¶ 174; Vickery Decl. Ex 28.)

FN5. Exhibits designated ("Ex.") are exhibits to the papers in support of the motions by Petrobras and MAC. Exhibits submitted by the IVI Group in opposition to the Petrobras motion are referred to as "IVI (Petr.) Ex." Exhibits submitted by IVI in opposition to the MAC motion are referred to as "IVI (MAC) Ex."

On or about October 27, 1994, Petrobras entered into Contract No. 574-2-001- 95 (the "P-34 Contract") with Astilleros Y Talleres del Noreste S.A. ("Astano"), in the sum of $115,249,964.03, with respect to the conversion of an existing vessel into a floating production, storage, and off-loading vessel, known as the P-34 Project. (IVI Group Am. Answer ¶ 176; Vickery Decl. Ex. 13.) On February 2, 1995, Astano subcontracted the P-34 Project work to IVI ("P-34 Subcontract"). (IVI Group Am. Answer ¶ 177; Vickery Decl. Ex. 14.) The terms

of the P-34 Subcontract provided that Petrobras would send payments directly to IVI according to the terms of the contract between Petrobras and Astano. (IVI Group Am. Answer ¶ 177; Vickery Decl. Ex. 14 Sec. 3.2.) On or about February 3, 1995, Petrobras confirmed and approved the P-34 Subcontract. (IVI Group Am. Answer ¶ 178.)

On or about February 10, 1995, IVI and Sade (collectively referred to as the "P-19 Consortium") entered into a contract with Petrobras/Brasoil for performance of the P-19 Project for the sum of U.S. $165,532,660.00 (the "P-19 Contract"). (IVI Group Am. Answer ¶ 179; Vickery Decl. Ex. 5.) The P-19 Contract, as extended by amendment, provided for completion on or before September 21, 1997. (IVI Group Am. Answer ¶ 181; Vickery Decl. Ex. 8.)

***4** On or about May 20, 1995, Petrobras advertised International Bid Tender No. 846-9-021-95 with respect to the P-31 Project, which concerned the conversion of a twenty year old oil supertanker into a floating production, storage and off-loading vessel. (IVIGroup Am. Answer ¶ 182; Vickery Decl. Ex. 28.) On or about October 25, 1995, IVI, Sade, and IESA (collectively referred to as the "P-31 Consortium") entered into a contract with Petrobras/Brasoil for performance of the P-31 Project for the sum of U.S. $163,000,021.00 (the "P-31 Contract"). (IVI Group Am. Answer ¶ 183; Vickery Decl. Ex. 9.) The P-31 Contract, as extended by amendment, provided for completion on or before April 5, 1998. (IVI Group Am. Answer ¶ 185; Vickery Decl. Ex. 12.)

The P-19 Contract, the P-31 Contract, and the P-34 Contract all provide for the Courts of the City of Rio de Janeiro, State of Rio de Janeiro, Brazil, as the exclusive forum for disputes arising from the performance of the Contracts. (Vickery Decl. Ex. 5, § 16.1; Vickery Decl. Ex. 9, § 21.1; Vickery Decl. Ex. 13, § 14.) In addition the P-19 Contract and the P-31 Contract provide that they are governed by Brazilian law. (Vickery Decl. Ex. 5, § 16.1; Bid Documents, incorporated in the P-31 Contract, attached as Vickery Decl. Ex. 28.) The P-34 Subcontract also provides that Brazilian law governs the subcontract and provides that the Courts of the City of Rio de Janeiro, Brazil shall settle any disputes arising under the P-34 Subcontract. (Vickery Decl. Ex. 14, § 11.)

Prior to the award of the P-19 and P-31 Contracts, Petrobras/Brasoil negotiated and arranged for the issuance of performance bonds by the Sureties for the P-19 and P-31 Projects. (IVI Group Am. Answer ¶ 187.) The Sureties subsequently issued two multimillion-dollar performance bonds (the "P-19 Bond" and the "P-31 Bond") guaranteeing the performance of the construction consortia for the P-19 and P-31 Projects. (First Am. Compl. ¶¶ 27-28; Vickery Decl. Exs. 15 & 16.) These Bonds named Brasoil as owner. (Vickery Decl. Exs. 15 & 16.)

In anticipation of the performance of the P-19 Project, Petrobras/Brasoil engaged in negotiations with Marubeni Corporation, the parent company of MAC, which made available loans or other funding in the amount of U.S. $175,000,000.00 for the cost of construction. The funds were to be dispersed in installments according to the timetable for the P-19 Project work with draw downs to take place quarterly upon presentation of evidence of the progress of the work. (IVI Third-Party Compl. ¶¶ 12-13.) Marubeni Corporation entered into a series of interrelated loan documents with, among others, Petrobras/Brasoil pursuant to which loans or funds up to $175,000,000.00 (the "Mother Loan") were to be made available for the cost of the P-19 construction. (IVI Third-Party Compl. ¶ 14.) The documents establishing the Mother Loan provide that any disbursement of Mother Loan funds was contingent upon, among other things, the absence of certain defined "Trigger Events" or "Events of Default," such as any default in the performance or observance by Petrobras/Brasoil of various agreements, including the P-19 Contract; the absence of any material default under the P-19 Project with the P-19 Consortium; and the continuing ability of the P-19 Consortium to perform its obligations under the P-19 Contract. (IVI Third-Party Compl. ¶¶ 15-16.)

***5** On or about June 30, 1995, MAC and IVI, acting on behalf of the P-19 Consortium, entered into a series of interdependent and interrelated agreements (the "MAC Agreements") whereby MAC agreed to provide financing to IVI in connection with the purchase of the Rig and certain major items of equipment for the P-19 Project. (IVI Third-Party Compl. ¶¶ 18, 20; IVI Group Am. Answer ¶ 192.) The MAC Agreements included, among others, the Participation Agreement, the Amended and Restated Equipment Purchase and

Sale Agreement, the Amended and Restated Rig Purchase and Sale Agreement, the Amended and Restated Assignment of IVI Receivables, and the Notice of Assignment of IVI Receivables. (IVI Third-Party Compl. ¶ 19; IVI(MAC) Exs. C-H.) Under the MAC Agreements, IVI was obligated to pay MAC approximately U.S.$38,000,000.00 in installments pursuant to a payment schedule. (IVI Group Am. Answer ¶ 193.)

The Sureties issued a payment bond (the "MAC Payment Bond"), which secured the financing provided by MAC to the P-19 Consortium. (First Am. Compl. ¶ 29; IVI Group's Am. Answer ¶ 189; IVI (Petr.) Ex. G.) The MAC Payment Bond named the Sureties as co-sureties; IVI and Sade as principals; Brasoil as owner; and MAC as claimant. (IVI (Petr.) Ex. G.) As additional security for its financing, MAC also received: (1) an assignment of all receivables due IVI under the P- 19 Contract from Brasoil (the "IVI Receivables Assignment") (IVI Third-Party Compl. ¶ 22; IVI (Petr.) Ex. K; IVI(MAC) Exs. G-H); (2) a guarantee by Sade and Sequip of IVI's payment obligation to MAC; and (3) Petrobras/Brasoil's consent to the IVI Receivables Assignment and Petrobras/Brasoil's agreement to make all payments due and payable under the P-19 Contract to an escrow account located in Texas for the purpose of paying MAC (the "Brasoil Payment Obligation") (IVI Third-Party Compl. ¶¶ 22, 24-25; IVI (Petr.) Ex. K; IVI(MAC) Ex. C, Sections 1.02, 1.06.)

To protect themselves from liability for losses and expenses on the P-19 Bond, the P-31 Bond, and the MAC Payment Bond, the Sureties entered into three indemnity agreements with the following principals: (1) Sade, Sade America, and Sade Chile (the "Sade Indemnity Agreement"); (2) Sequip, IVI, and Sade (the "Sequip/IVI/Sade Indemnity Agreement"); and (3) Inepar A & P and Inepar I & C (the "Inepar Indemnity Agreement"). (First Am. Compl. ¶¶ 19-21; Vickery Decl. Ex. 22 ("Indemnity Agreements")). (Collectively, these entities are referred to as the "Principals/Indemnitors" and the three agreements are referred to as the "Indemnity Agreements.") The total indemnity obligations covered by the Indemnity Agreements amounted to U.S. $900 million. (First Am. Compl. ¶ 22.) Pursuant to these Indemnity Agreements, which are identical in all material respects, the Principals/Indemnitors agreed, jointly and severally, among other things, to "exonerate, indemnify, and keep indemnified the Surety from and against any and all liability for losses and/or expenses of whatsoever kind or nature (including, but not limited to, interest, court costs, and counsel fees) and from and against any and all such losses and/or expenses which the Surety may sustain and incur ... [b]y reason of having executed or procured the execution of the Bonds ...." (Indemnity Agreements, Second clause.) Moreover, the Principals/Indemnitors agreed to make payment "equal to the amount of reserve set by" the Surety "as soon as liability ... is asserted against the Surety." (*Id.;* First Am. Compl. ¶¶ 24-26.) MAC argues that the Sequip/IVI/Sade Indemnity Agreement assigned all rights and claims relating to the transaction with MAC to the Sureties upon the occurrence of various triggering events. (Vickery Ex. 22; Declaration of Edward Flanders dated January 24, 2000 ("Flanders Decl."), Ex. 2.)

***6** The Indemnity Agreements contemplated payment in the United States by requiring the Principals/Indemnitors, if they did not have their principal places of business in the United States and if there were restrictions on transferring money from the countries in which they had their principal places of business, to obtain all necessary approvals to "transfer money ... to the United States." (*See* Indemnity Agreements ¶ 20). The limits of indemnity are stated in United States dollars. (*Id.* ¶ 21.) Similarly, the P-19, P- 31, and MAC Payment Bonds are all expressed in United States dollars. (Vickery Decl. Exs. 15 & 16; IVI (Petr.) Ex. G.) Each of the Indemnity Agreements provides that it shall be interpreted under New York law and that the Principals/Indemnitors irrevocably submitted themselves to the jurisdiction and venue of the United States District Court for the Southern District of New York, although the clauses do not specify that such jurisdiction is exclusive. (Indemnity Agreements ¶ 19.)

The IVI Groupalleges that almost immediately after the respective contracts were executed and before work was commenced on the P-19, P-31 and P-34 Projects, Petrobras/Brasoil began to interfere with and seek to control all aspects of design and work on the Projects. (IVI Group Am. Answer ¶ 196.) Petrobras/Brasoil allegedly imposed numerous and significant changes to the Projects, increasing construction costs dramatically. (IVI Group Am. Answer ¶¶ 197-203.) As of February 1996, Petrobras/Brasoil allegedly assumed control

over the funding and finances for the P-19, P-31 and P-34 Projects though a "blocked accounts" mechanism, whereby no payments could be made without the prior and express approval of Petrobras/Brasoil, including payments to MAC. (IVI Group Am. Answer ¶¶ 205-06; IVI's Third-Party Compl. ¶ 26; Vickery Decl Exs. 7, Third Clause & 10, Fourth Clause; IVI (Petr.) Ex. L, Section Four.) The IVI Group alleges that all funds for the P-19, P-31 and P-34 Projects were commingled by Petrobras/Brasoil and were processed in a single bookkeeping system. (IVI Group Am. Answer ¶ 210.) On April 2, 1996 Petrobras/Brasoil and the construction consortia for the respective projects executed a joint agreement documenting the procedures to be followed in the cross application of funds between the P-19, P-31 and P-34 Projects. (IVI (Petr.) Ex. M.)

The Sureties allege that no later than April 1997, IVI, the construction consortia for the P-19, P-31, and P-34 Projects, and Petrobras/Brasoil entered into a contract relating to the continued performance of the three projects ("Consortia/IVI/Petrobras Contract"). (First Am. Compl. ¶ 114; IVI Group Am. Answer ¶ 212 .) The Consortia/IVI/Petrobras Contract allegedly provided that Petrobras/Brasoil would make available money to continue to fund and pay for the costs of the P-19, P-31, and P-34 Projects. It was allegedly agreed that the IVI Group would continue to perform their obligations on the respective projects through completion, that the IVI Group would defer submitting change orders until the completion of the projects, and that at that time the deferred change orders would be submitted and settled with the IVI Group reimbursing Petrobras/Brasoil for any excess that Petrobras/Brasoil had paid over the amount it was determined to owe, and the IVI group paying Petrobras/Brasoil for any excess amounts that members of the IVI Group had been paid over what they were deemed to be entitled to. (First Am. Compl. ¶¶ 116- 117; IVI Group Am. Answer ¶¶ 212, 258-259; IVI (Petr.) Ex. N.) A letter dated April 23, 1997, which contained many of the terms of the alleged Consortia/IVI/Petrobras Contract, indicates that Petrobras/Brasoil was considering a declaration of default with respect to the construction consortia for the three Projects and that the letter did not change any of the rights or contractual obligations assumed by the parties or the Sureties. (IVI (Petr.) Ex. N.)

*7 IVI alleges that beginning in or about April 1997, representatives of Petrobras/Brasoil and representatives of Marubeni Corporation and/or MAC conspired to create or manufacture a claim under the MAC Payment Bond. (IVI Third-Party Compl. ¶ 29.) Thereafter, Petrobras/Brasoil allegedly refused to permit the release of P-19 Project funds to MAC or to otherwise facilitate payment. (IVI Third-Party Compl. ¶ 30.)

In May 1997, Brasoil declared the P-19 Consortia to be in default, thus triggering the Sureties' obligations under the P-19 Bond. (First Am. Compl. ¶¶ 30, 31; Vickery Decl. ¶ Ex. 18.) In June 1997, Brasoil declared the P-31 Consortia to be in default, triggering the Sureties' obligations under the P-31 Bond. (First Am. Compl. ¶¶ 33, 34; Vickery Ex. 19.) Thereafter, Brasoil filed actions in Brazil asserting liability for loss and/or damages against the Sureties pursuant to the P-19 and P-31 Bonds (the "Rio P-19 Lawsuit" and the "Rio P-31 Lawsuit," respectively). (First Am. Compl. ¶¶ 32, 35). Although the Sureties deny any liability under the P-19 and P-31 Bonds, they argue that these actions by Brasoil constitute an assertion of liability against them under the P-19 and P-31 Bonds for purposes of the Second clause of the Indemnity Agreements. (First Am. Compl. ¶ 36). Pursuant to the Indemnity Agreements, the Sureties assert that they have set combined reserves in the amount of U.S. $15,000,000 to cover, among other things, their exposure for expenses and potential exposure for loss from the alleged liabilities asserted by Brasoil against each of them in the Rio P-19 and Rio P-31 Lawsuits. (First Am. Compl. ¶ 39).

Despite the notices of default, the construction consortia continued work on the P-19, P-31, and P-34 Projects based upon the Consortia/IVI/Petrobras Contract and Petrobras/Brasoil continued funding and paying through the blocked accounts. (IVI Group Am. Answer ¶¶ 216-218.) In May 1997, pursuant to the procedure imposed by Petrobras/Brasoil for the funding and payment of the construction consortia's financial needs, IVI submitted a monthly list of suppliers, subcontractors and owners for which it sought Petrobras/Brasoil's approval and funding, including an installment payment due to MAC. Petrobras/Brasoil approved numerous items on the list, including the MAC installment payment and deposited substantial funds into IVI's blocked accounts, including money specifically for the MAC

installment payment. (IVI Group Am. Answer ¶ 219-220.) Subsequently, Petrobras/Brasoil allegedly refused to execute the required dual-signature transfer instructions required to effect the MAC installment payment, preventing IVI from making the payment with the funds already on deposit for that purpose. (IVI Group Am. Answer ¶ 222.) Petrobras/Brasoil informed IVI that it was refusing to permit IVI or the construction consortia for the three projects to make the MAC installment payment and other payments to suppliers. (IVI Group Am. Answer ¶¶ 224, 227, 233.)

***8** In June 1997, MAC declared IVI in default of the MAC Agreements, declared an acceleration of all remaining installments due under the MAC Agreements, and made claims against the Sureties under the MAC Payment Bond. (IVI Third-Party Compl. ¶¶ 31-32; IVI(MAC) Exs. J26, J27, J28.) By letter dated July 23, 1997, IVI tendered in full satisfaction of its debt under the MAC Agreements all equipment encompassed by the MAC Agreements ("Tendered Equipment"). At the time, IVI and/or Petrobras/Brasoil, on the P-19 Consortium's behalf, had already paid MAC approximately U.S. $26,000,000.00 of the approximately U.S. $38,000,000.00 originally due under the MAC Agreements and the Tendered Equipment had a market resale value in excess of the remaining debt to MAC under the MAC Agreements. (IVI Third-Party Compl. ¶ 33.) IVI alleges that representatives from Petrobras/Brasoil met or spoke with representatives of Marubeni Corporation and/or MAC to prevent IVI from satisfying the MAC Payment Bond claim through the return of the Tendered Equipment. (IVI Third-Party Compl. ¶ 34.) Thereafter, MAC rejected IVI's tender of the Tendered Equipment. (IVI Third-Party Compl. ¶ 35.) MAC then sued the Sureties in the New York State Supreme Court, New York County, ("State Court Action") on the MAC Payment Bond (the "MAC Complaint"). (Am. Comp. ¶ 40; MAC Ex. 5.) On January 7, 2000, the New York State Supreme Court, New York County granted summary judgment to MAC on its claim under the MAC Payment Bond. (MAC Ex. 9.) The Appellate Division, First Department affirmed the grant of summary judgment on February 1, 2001. *See Marubeni America Corp. v. United States Fidelity and Guaranty Co.,* Nos. 3162, 3163, 3163A, 2001 WL 83478, at *1 (N.Y.App.Div. Feb. 1, 2001).

The IVI Group alleges that on or about August 17, 1997, Petrobras/Brasoil ordered that the work product from the P-19 Project be towed from IVI's shipyard. In or about September 1997, Petrobras/Brasoil allegedly accepted the P-19 work as completed. (IVI Group Am. Answer ¶¶ 234-235.) The IVI Group asserts that, on or about December 4, 1997, when the P-31 Project was approximately ninety-five percent complete, Petrobras/Brasoil removed the P- 31 Consortium from the worksite and barred the P-31 Consortium from the site until on or about May 19, 1998, despite the fact that the worksite was owned and operated by IVI. (IVI Group Am. Answer ¶¶ 236-237.)

The Sureties have filed this action seeking specific performance by the Principals/Indemnitors of their alleged obligations under the Indemnity Agreements and the common law of suretyship (Counts 1-5, 12-13). Although Petrobras is not a party to any of the Indemnity Agreements, it is also sued for specific performance of various contract and common law obligations as the partner or dominator of the Principals/Indemnitors (Counts 6-8, 10-11, 13). In addition, the Sureties have also asserted a tort claim against Petrobras alleging that Petrobras tortiously interfered with the payment obligations of the P-19 Consortium and Brasoil to MAC (Count 9). The Sureties argue that the MAC Complaint also constitutes an assertion of liability for purposes of the Second clause of the Indemnity Agreements.

***9** The IVI Group has brought cross-claims against Petrobras/Brasoil for breach of the terms of the P-19, P-31, and MAC Payment Bond and related obligations and the covenant of good faith and fair dealing (Cross-Claim 1); breach of various contracts, including the alleged Consortia/IVI/Petrobras Contract, the P-19 Contract, the P-31 Contract and the P-34 Contract (Cross-Claims 2-3); quantum meruit (Cross-Claim 4); negligent misrepresentation (Cross-Claim 5); breach of agency (Cross-Claim 6); breach of fiduciary and partnership obligations (Cross-Claim 7); lender liability (Cross- Claim 8); tortious interference (Cross-Claim 9); fraud (Cross-Claim 10); exoneration (Cross-Claim 11); and for a constructive trust (Cross-Claim 12). The IVI Group has also brought a subrogation claim against all co-defendants, including Petrobras/Brasoil, arguing that, to the extent the IVI Group is required to pay the Sureties for any claims, the IVI Group then

should be entitled to assert any claims by the Sureties against the remaining defendants. The IVI Group has also asserted various other cross-claims against other defendants that are not the subject of a motion to dismiss. [FN6] In addition, IVI filed a third-party action against MAC seeking a declaratory judgment that IVI is not liable to MAC (Third-Party Count 1) and for breach of contract (Third-Party Count 2).

FN6. Prior to asserting the cross-claims in this action, IVI and Sade sued Brasoil and Petrobras in Brazil on three occasions for damages allegedly incurred in connection with the P-19 and P-31 Contracts. In April 1999, IVI and Sade commenced an action against Brasoil and Petrobras in the Civil Court of Rio de Janeiro seeking damages arising out of the P-31 Contract. (Vickery Decl. Ex. 25.) In August 1999, IVI filed another action against Petrobras and Brasoil in the Civil Court of Rio de Janeiro, seeking damages relating to the defendants' allegedly inappropriate use of a particular shipyard. (Vickery Decl. Ex. 26.) Also in August 1999, IVI and Sade filed a third action against Brasoil and Petrobras in the Civil Court of Rio de Janeiro, asserting claims arising out of the P-19 Contract. (Vickery Decl. Ex. 24.)

III.

The defendant MAC moves pursuant to Fed.R.Civ.P. 12(b)(6) and 17(a) to dismiss both counts of IVI's third-party complaint for failure to state a claim. MAC first argues that IVI cannot bring these claims because IVI assigned any claims against MAC to the Sureties and thus is not the real party in interest and has no standing. [FN7] MAC also contends that the determination by the trial judge in the State Court Action, affirmed on appeal, that MAC was not engaged in a conspiracy with Petrobras to create a claim under the MAC Payment Bond precludes IVI's third-party claims in this case.

FN7. IVI argues that MAC's motion relies on materials outside the scope of the pleadings and must be converted to a motion for summary judgment and that IVI should be granted time to conduct discovery in order to respond. The Federal Rules of Civil Procedure do not specify a procedure for raising an objection that a plaintiff is not the real party in interest, although "a real party in interest objection closely resembles the defense of failure to state a claim for relief" under Rule 12(b)(6) . *See* Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, 6A Federal Practice and the Procedure § 1554, p. 407 (1990). Although MAC's notice of motion refers solely to Fed.R.Civ.P. 12(b)(6) in moving to dismiss IVI's third-party claims, it is clear that, with respect to MAC's argument that IVI is not the real party in interest, MAC is also relying on Fed. R. Civ. 17(a). *See, e.g., Tagare v. NYNEX Network Systems Co.,* 921 F.Supp. 1146, 1149 (S.D.N.Y.1996) (motion to dismiss made pursuant to Rule 12(b)(6) and 17(a) on the grounds that a party was not a real party in interest); *Leucadia National Corp. v. FPL Group Capital, Inc.,* No. 93 Civ. 2908, 1993 WL 464691, at *2 (S.D.N.Y. Nov. 9, 1993) (same). MAC also argues in its reply papers that the motion to dismiss on these grounds should also be considered under Rule 12(b)(1) because it is akin to challenging IVI's standing and thus the Court may consider materials outside the pleadings. To decide this motion, however, it is not necessary to consider any evidence outside of the pleadings, the documents incorporated by reference in the third-party complaint, or matters of which judicial notice may be taken and the Court has declined to convert MAC's motion into a motion for summary judgment. With respect to materials from the State Court Action, the Court may take judicial notice of the relevant pleadings, motion papers, orders, and judgments in the State Court Action without converting MAC's motion to one for summary judgment. *See Marchon Eyewear, Inc. v. Tura, L.P.,* No. 98 Civ.1932, 1999 WL 184107, at *2 (E.D.N.Y. Mar. 28, 1999).

A.

Fed.R.Civ.P. 17(a) provides that "[e]very action

shall be prosecuted in the name of the real party in interest." Fed.R.Civ.P. 17(a). Rule 17(a) requires that a cause of action "must be brought by the person who, according to the governing substantive law, is entitled to enforce the right." Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, 6A Federal Practice and the Procedure § 1543, p. 334 (1990). MAC argues that IVI is not the real party in interest because the Sequip/IVI/Sade Indemnity Agreement assigned all of IVI's rights and causes of actions related to the Payment Bond to the Sureties and thus only the Sureties may assert the third-party claims brought by IVI.

In general, under New York law, an assignor of a claim retains no right to pursue that claim upon assignment and the assignee is the real party in interest with respect to that claim. *See James McKinney & Son, Inc. v. Lake Placid 1980 Olympic Games, Inc.*, 462 N.E.2d 137, 139 (N.Y.1984); *National Financial Co. v. Uh*, Nos. 1666, 1666A, 2001 WL 59434, at *1 (App.Div. Jan. 23, 2001); *Rehab Medical Care of New York, P.C. v. Travelers Ins. Co.*, 706 N.Y.S.2d 614, 616 (Civ.Ct.2000); *see also Pay Tel Systems, Inc. v. Seiscor Tech., Inc.*, 850 F.Supp. 276, 278 (S.D.N.Y.1994) ("Where complete assignments have been made, the assignee is the real party in interest...."). Here, the Sequip/IVI/Sade Indemnity Agreement contains an assignment provision that is effective if there is, among other things, "any abandonment, forfeiture or breach of any contracts referred to in the Bonds or of any breach of any said Bonds" or "a default in discharging such other indebtedness or liabilities when due." (MAC Ex. 2, Third clause.) Once effective, IVI and the other assignors assigned to the Sureties:

> ***10** (a) All the rights of the Principals in, and growing in any manner out of, all contracts referred to in the Bonds, or in, or growing in any manner out of the Bonds; (b) All the rights, title and interest of the Principal in and to all machinery, equipment, plant, tools and materials [for the work referred to in the Bonds] ...; (c) All the rights, title and interest of the Principal in and to all subcontracts ... in connection with any and all contracts referred to in the Bonds ...; [and] (d) All actions, causes of actions, claims and demands whatsoever which the Principals may have or acquire against any subcontractor, laborer, or materialmen, or any person furnishing or agreeing to furnish or supply labor, material, supplies, machinery, tools, other equipment in connection with or on account of any and all contracts referred to in the Bonds ....

(MAC Ex. 2, Third Clause.) MAC argues that IVI's third-party claims are covered by this assignment provision of the Sequip/IVI/Sade Indemnity Agreement and that the Sureties are the real parties in interest.

In response, IVI first argues that the assignment in the Sequip/IVI/Sade Indemnity Agreement was not triggered. Among other things, IVI contends that IVI's third-party claims are based on the premise that IVI was not in default on the contracts referred to in the Bonds and that its third-party claims arise out of the MAC Agreements, which IVI alleges are not "referred to in the Bonds." In addition, IVI argues that the assignment clause in the Sequip/IVI/Sade Indemnity Agreement does not apply to claims arising from the financing transaction between MAC and IVI because MAC was a financier and not a subcontractor, laborer, or materialman, or other person agreeing to furnish or supply labor, material, supplies, machinery, tools or other equipment.

Whether the Sequip/IVI/Sade Indemnity Agreement was triggered cannot be decided on a motion to dismiss. First, there is a genuine factual dispute as to whether IVI defaulted on the construction contracts referred to in the P- 19, P-31, and MAC Payment Bonds such that the assignment was triggered. Second, it is not clear from the pleadings and the documents incorporated by reference that the MAC Agreements, upon which IVI allegedly relies on in bringing its third-party claims, are contracts "referred to in the Bonds." (Vickery Decl. Exs. 15 & 16; IVI (Petr.) Ex. G.) Thus, it cannot be decided that breach of the MAC Agreements would trigger the indemnity and there is a genuine dispute as to whether IVI breached any construction contract.

IVI contends that, in any event, MAC is precluded by the doctrine of judicial estoppel from arguing that IVI assigned its rights and claims to the Sureties. The doctrine of judicial estoppel prevents a party from advancing contradictory factual positions in separate legal proceedings. *See Simon v. Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir.1997); *AXA Marine & Aviation Ins. (UK) Ltd. v. Seajet Industries Inc.*, 84 F.3d 622, 628 (2d Cir.1996); *Bates v. Long Island Railroad Co.*, 997 F.2d 1028, 1037 (2d Cir.1993); *Generali--U.S.*

Branch v. Genesis Ins. Co., No. 94 Civ. 8492, 1997 WL 27040, at *1 (S.D.N.Y. Jan. 23, 1997). The doctrine is designed "to preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions," and "to protect judicial integrity by avoiding the risk of inconsistent results in two proceedings." *Bates,* 997 F.2d at 1038; *see also Simon,* 128 F.3d at 71. In order to invoke judicial estoppel, a party must establish that the party against whom judicial estoppel is being asserted must have argued an inconsistent factual position in a prior proceeding and that the court in the prior proceeding must have adopted the prior inconsistent position in some manner, *see AXA Marine,* 84 F.3d at 628; *Bates,* 997 F.2d at 1038 & n. 4, such as by rendering a favorable judgment. *See Maharaj v. BankAmerica Corp.,* 128 F.3d 94, 98 (2d Cir.1997) (citing *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Georgiadis,* 903 F.2d 109, 114 (2d Cir.1990)). "Circumspection in the use of judicial estoppel is warranted because of a concern for offending the liberal spirit of the federal pleading rules," and, in particular, because of its tension with the alternative pleading provisions of Fed.R.Civ.P. 8(e)(2). *Mohamed v. Marriott Int'l, Inc.,* 944 F.Supp. 277, 280 (S.D.N.Y.1996); *cf. Bates,* 997 F.2d at 1038 n. 3 (noting that the goal of preserving the sanctity of the oath by demanding consistency in all sworn positions "is somewhat inconsistent with the spirit of Fed.R.Civ.P. 8(e)(2), which permits alternative and inconsistent pleading").

***11** In this case, MAC is judicially estopped from asserting that IVI is not the real party in interest. First, MAC argued an inconsistent factual position in the proceedings in the State Court Action. In that case, MAC moved for summary judgment and argued in its reply papers that the Sureties had no standing to raise claims on behalf of IVI. (MAC Ex. 7 at 3-4.) MAC specifically asserted that "to gain standing to assert IVI's claims, the Sureties must substitute themselves for the principal (IVI) by either paying MAC's claims, obtaining IVI's express consent to the assertion of its claims, or demonstrating that IVI is insolvent" and that the Sureties did not argue that any of these circumstances existed and did not present evidence to substantiate the occurrence of any of these circumstances. (MAC Ex. 7 at 3-4.) MAC now argues that IVI assigned all of its rights and claims to the Sureties, that only the Sureties may bring claims against MAC that arise out of an alleged breach of the MAC Agreements, and that the third-party complaint must therefore be dismissed because the third-party claims are covered by the assignment and IVI is not the real party in interest.

MAC's current position is clearly inconsistent with MAC's prior position taken in the State Court Action. In the State Court Action, MAC argued that the Sureties could not assert IVI's claims, while in this action MAC argues that only the Sureties can assert IVI's claims.

MAC argues that the Sureties failed properly to bring the assignment provision in the Sequip/IVI/Sade Indemnity Agreement to the attention of the state trial court and MAC in the State Court summary judgment briefing, and thus the assignment was not before the State Court. MAC contends that the argument in its reply brief in the State Court Action concerning standing to assert IVI's claims was made simply to raise the issue with the Court that the Sureties did not establish a basis in that case for asserting IVI's claims. At argument of the pending motions, however, MAC's counsel candidly conceded that the Sequip/IVI/Sade Indemnity Agreement containing the assignment provision had been produced to MAC in the State Court Action prior to the briefing on the motion for summary judgment and that, in a reply brief on a related motion, the Sureties did argue to the State Court that they had standing to assert IVI's claims based on the assignment. [FN8] (Tr. at 106-107; MAC Ex. 8 at 12 n. 14.) Thus, MAC was on notice of the assignment when it filed its motion for summary judgment and yet argued that the Sureties did not have standing to raise claims on behalf of IVI.

> FN8. It should also be noted that MAC did not raise the standing argument until the reply brief on the motion for summary judgment in the State Court Action. Thus, the Sureties were not given an opportunity to respond to that argument in their papers in opposition to the motion for summary judgment.

Second, the state trial court adopted MAC's inconsistent position in that proceeding. Specifically, in rejecting the Sureties' affirmative defense of economic duress and undue influence, the state trial court, in an alternative holding,

concluded that "the Sureties have no standing to raise the claim of economic interest and undue influence on behalf of IVI." (MAC Ex. 9 at 6.) Thus, the state trial court adopted the exact argument that MAC made in its reply papers and cited cases discussed in MAC's reply brief and relied, in part, on the argument in granting MAC's motion for summary judgment. (MAC Ex. 7 at 3.) Because MAC is presently advancing an inconsistent factual position from that of its position in the State Court Action and the state trial court adopted MAC's prior position that the Sureties could not raise claims on behalf of IVI, MAC is estopped from arguing that IVI is not the real party in interest in this case and that only the Sureties may bring the claims asserted by IVI in the third-party complaint.

B.

***12** MAC also argues that the state trial court's determination, affirmed on appeal, that MAC was not engaged in a conspiracy with Petrobras to create a claim under the MAC Payment Bond precludes IVI's third-party claims in this case. Third-Party Count 1 seeks a declaratory judgment that IVI or the P-19 Consortium is not liable to MAC under the MAC Payment Bond alleging that MAC has unclean hands by virtue of its unconscionable conduct in that MAC materially breached the MAC Agreements and breached its covenant of good faith and fair dealing. Third-Party Count 2 seeks recovery of damages from MAC for the alleged breach of the MAC Agreements and MAC's covenant of good faith and fair dealing.

Under 28 U.S.C. § 1738, federal courts " 'must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." ' *Golino v. City of New Haven,* 950 F.2d 864, 869 (2dCir.1991) (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984)). The preclusive effect of a state court determination in a subsequent federal proceeding is governed by the rules of the state in which the prior determination was rendered, in this case New York. *See Sullivan v. Gagnier,* 225 F.3d 161, 166 (2d Cir.2000); *In re Sokol,* 113 F.3d 303, 306 (2d Cir.1997). Under New York law, "[c]ollateral estoppel or issue preclusion 'precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party [or those in privity,] whether or not the tribunals or causes of action are the same." ' *Sullivan,* 225 F.3d at 166 (quoting *Ryan v. New York Tel. Co.,* 467 N.E.2d 487, 490 (N.Y.1984)); *see also Fletsher v. Atex, Inc.,* 68 F.3d 1451, 1457 (2d Cir.1995). Whether an issue decided in a prior proceeding has preclusive effect "depends on the specific facts and circumstances of each case." *Sullivan,* 225 F .3d at 166.

Collateral estoppel applies only " 'if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in the earlier action." ' *Id.* (quoting *Parker v. Blauvelt Volunteer Fire Co.,* 712 N.E.2d 647, 651 (N.Y.1999)); *see also Khandhar v. Elfenbein,* 943 F.2d 244, 247 (2d Cir.1991); *Kaufman v. Eli Lilly & Co.,* 482 N.E.2d 63, 67 (N.Y.1985). In addition, the issue must be decisive and conclusive in the subsequent action. *See Wight v. BankAmerica Corp.,* 219 F.3d 79, 86 (2d Cir.2000); *D'Arata v. New York Central Mutual Fire Ins. Co.,* 564 N.E.2d 634, 666 (N.Y.1990); *Ryan,* 467 N.E.2d at 500-501.

The party seeking the benefit of collateral estoppel bears the burden of demonstrating the identity of issues and the necessity of their having been decided, and the opponent of preclusion has the burden of proving the absence of a full and fair opportunity to litigate the issue in the prior proceeding. *See Sokol,* 113 F.3d at 306; *Jackson v. Ramundo,* No. 95 Civ. 5832, 1997 WL 678167, at *4 (S.D.N.Y. Oct. 30, 1997); *Parker,* 712 N.E.2d at 651; *Kaufman,* 482 N.E.2d at 67. "The doctrine of collateral estoppel 'is grounded on concepts of fairness and should not be rigidly or mechanically applied." ' *Sokol,* 113 F.3d at 306 (quoting *D'Arata,* 564 N.E.2d at 666); *see also People v. Roselle,* 643 N.E.2d 72, 75 (N.Y.1994).

***13** In this case, collateral estoppel does not preclude IVI from disputing whether MAC's actions breached the MAC Agreements because MAC has not established the requisite identity of issue between IVI's claims in this case and those in the State Court Action. In the State Court Action, the Sureties argued that MAC conspired with Petrobras to create a claim under the MAC Payment Bond and that this gave rise to a discharge of the Sureties' obligations under the MAC Payment Bond. (MAC Exs. 4 at 22-24, 6 at 25-26 & 7 at 22-28.) The state

trial court necessarily decided the issue in its decision granting MAC's motion for summary judgment when it determined that there was a "lack of significant probative evidence tending to support the conspiracy claim defense" and the issue was material to the state trial court's determination. (MAC Ex. 9 at 8-9.) In addition, the issue was raised on appeal and the Appellate Division, First Department affirmed the state trial court's determination on the issue. *See Marubeni,* 2001 WL 83478, at *1.

IVI's Third-Party Complaint in this case makes various allegations that IVI and Petrobras met or communicated secretly in order to conspire to create or manufacture a claim under the MAC Payment Bond. (Third-Party Complaint ¶¶ 29, 40, 50.) Although the issue for which MAC seeks collateral estoppel here was actually litigated and necessarily decided in favor of MAC in the State Court Action, and the issue is raised in IVI's third-party claims, MAC has not met its burden of establishing that the issue of whether there was a conspiracy between MAC and Petrobras is decisive of IVI's third-party claims in this case. Third-Party Counts 1 and 2 contain allegations that MAC breached the MAC Agreements and its covenant of good faith and fair dealing and are broader in scope than the conspiracy allegations made by the Sureties in the State Court Action. Although the third-party claims contain allegations of a conspiracy between MAC and Petrobras, the third-party claims also contain allegations with respect to MAC and its alleged breach of the MAC Agreements that, standing alone, without the conspiracy allegations, could lead to a judgment in favor of IVI. Thus, because IVI has stated claims without the conspiracy allegations, the issue of whether MAC and Petrobras conspired to create a claim under the MAC Payment Bond is not decisive of the claims in this case, and IVI's third- party claims cannot be dismissed based on the doctrine of collateral estoppel.

IV.

Petrobras moves to dismiss the IVI Group's cross-claims against it on the basis that the IVI Group is bound by mandatory forum selection clauses contained in each of the P-19, P-31, P-34 Contracts and the P-34 Subcontract ("Construction Contracts") that require that disputes be litigated in Brazil. [FN9] The P-19 Contract contains the following explicit forum selection and choice of law clause:

> FN9. While Courts have differed over whether a motion to dismiss based on a forum selection clause is properly a Rule 12(b)(6) motion or a Rule 12(b)(3) motion, *see, e.g., New Moon Shipping Co., Ltd. v. Man B & W Diesel AG,* 121 F.3d 24, 28-29 (2d Cir.1997); *J.B. Harris, Inc. v. Razel Bar Indus, Ltd.,* No. 97 Civ. 3520, 1998 WL 896625, at *2 (E.D.N.Y. Aug. 11, 1998), *aff'd,* 181 F.3d 82 (2d Cir.1999) , there is no need to resolve that issue here because Petrobras's current motion is a motion for judgment on the pleadings under Rule 12(c).

16.1 The Courts of the City of Rio de Janeiro, State of Rio de Janeiro, Brazil, shall be deemed competent to handle any questions arising from the performance of this Contract, and the parties hereby forego any others, no matter how privileged they may be.
***14** -- This Contract shall be governed by the laws of Brazil.

(Vickery Decl. Ex. 5, section 16.1.) [FN10] The P-31 Contract provides:

> FN10. The respective forum selection clauses contained in the Construction Contracts have been translated into English from the original Portuguese versions.

21.1 The Courts of the City of Rio de Janeiro, State of Rio de Janeiro, Brazil, are chosen as the venue with competence to resolve any questions arising from the performance of this Contract, and the parties expressly relinquish any other venue, no matter how privileged it may be.

(Vickery Decl. Ex. 9, section 21.1.) The P-34 Contract contains the following explicit forum selection clause:

14.1 The Courts of the City of Rio de Janeiro, State of Rio de Janeiro, Brasil, shall be deemed competent to handle any questions arising from the performance of this Contract, and the parties renounce any other [fora] no matter how privileged they may be.

(Vickery Decl. Ex. 13, section 14.1.) In addition, the P-34 Subcontract provides:

> 11. *Law and Jurisdiction.*
> This subcontract shall be governed by the Laws of the Federative Republic of Brasil, and any disputes arising hereunder shall be settled by the Courts of the City of Rio de Janeiro, Brasil.

(Vickery Decl. Ex. 14, section 11.)

It is plain, and the IVI Group does not dispute, that the forum selection clauses contained in each of the P-19, P-31, P-34 Contracts and the P-34 Subcontract are mandatory forum selection clauses. The distinction between a mandatory and permissive forum selection clause "can be crucial since a forum selection clause need not be enforced unless it is, on its face, mandatory." *Bison Pulp & Paper Ltd. v. M/V Pergamos,* No. 89 Civ. 1392, 1995 WL 880775, *9 (S.D.N.Y. Nov. 29, 1995); *see also John Boutari & Sons, Wines & Spirits, S.A. v. Attiki Importers & Distribs. Inc.,* 22 F.3d 51, 53 (2d Cir.1994). If jurisdiction and venue are specified with mandatory or exclusive language, the forum selection clause will be enforced. *See Boutari,* 22 F.3d at 53; *Bison,* 1995 WL 880775 at *10. However, " '[w]hen only jurisdiction is specified the clause will generally not be enforced without some further language indicating the parties' intent to make jurisdiction exclusive." ' *Boutari,* 22 F.3d at 52 (quoting *Docksider, Ltd. v. Sea Technology, Ltd.,* 875 F.2d 762, 764 (9th Cir.1989)) (alteration in original); *see also Bison,* 1995 WL 880775 at *10.

In this case, the language of the various forum selection clauses does not merely indicate that the Courts of the City of Rio de Janeiro, Brazil, shall have jurisdiction over all disputes, but instead, requires that such disputes must be resolved in that forum. *See, e.g., Bison,* 1995 WL 880775, at *11. The forum selection clauses in this case deem the Courts of the City of Rio de Janeiro, Brazil, as competent to handle or resolve "any questions arising from the performance of" the P-19, P-31, and P-34 contracts and the parties agreed to "forgo," relinquish," or "renounce," any other forum. The P-34 Subcontract requires that any disputes arising under the subcontract "shall be settled by the Courts of the City of Rio de Janeiro, Brasil." To hear such a dispute in any other court would be inconsistent with the various explicit forum selection clauses. These clauses do not simply create jurisdiction in the court in Brazil, they create exclusive jurisdiction. *See LPR, SRL v. Challenger Overseas, L.L.C.,* 89 Civ. 8883, 2000 WL 973748, at *2-3 (S.D.N.Y. Jul. 13, 2000); *see also Bison,* 1995 WL 880775, at *11 (finding that the language "shall be decided" in a forum selection clause indicated that the clause was mandatory).

***15** A mandatory forum selection clause of this nature is presumptively valid and it must be enforced unless the party resisting the clause makes a strong showing that the clause should be set aside. *See M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972); *Roby v. Corporation of Lloyd's,* 996 F.2d 1353, 1362-63 (2d Cir.1993); *Challenger Overseas,* 2000 WL 973748, at * 3. As the Court of Appeals for the Second Circuit explained in *Roby:*

> The Supreme Court certainly has indicated that forum selection and choice of law clauses are presumptively valid where the underlying transaction is fundamentally international in character. In *The Bremen,* the Court explained that American parochialism would hinder the expansion of American business and trade, and more generally, interfere with the smooth functioning and growth of global commerce. Forum selection ... clauses eliminate uncertainty in international commerce and insure that the parties are not unexpectedly subjected to hostile forums and laws. Moreover, international comity dictates that American courts enforce these sorts of clauses out of respect for the integrity and competence of foreign tribunals. In addition to these rationales for the presumptive validity of forum selection and choice of law clauses, the Court has noted that contracts entered into freely generally should be enforced because the financial effect of forum selection ... clauses likely will be reflected in the value of the contract as a whole.

Roby, 996 F.2d at 1362-63 (citations and footnote omitted).

The presumptive validity of a forum selection clause may only be overcome if "enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *Bremen,* 407 U.S. at 10; *see also Roby,* 996 F.2d at 1363. Forum selection clauses are 'unreasonable':

> (1) if their incorporation into the agreement was the result of fraud or overreaching; (2) if the complaining party 'will for all practical purposes be deprived of his day in court,' due to the grave inconvenience or unfairness of the selected forum; (3) if the fundamental unfairness of the chosen law may deprive the plaintiff of a remedy; or (4) if the clauses contravene a strong public

policy of the forum state.
Roby, 996 F.2d at 1363 (citations omitted).

In this case, the IVI Group does not contend that there has been fraud or overreaching or that enforcement of the forum selection clauses will deprive its members of their day in court. In addition, the IVI Group, which consists primarily of Brazilian entities, conceded at argument on these motions that Brazil is an adequate alternative forum for the resolution of the IVI Group cross-claims and there is no argument that Brazilian law is fundamentally unfair, thus depriving the IVI Group of a remedy. *See Interamerican Trade Corp. v. Companhia Fabricadora de Pecas,* 973 F.2d 487, 489-490 (6th Cir.1992) (determining that the courts in Brazil are fully competent and that Brazil is an adequate forum); *Mendes Junior Int'l Co. v. Brasil, S.A.,* 15 F.Supp.2d 332, 335-336 (S.D.N.Y.1998), *appeal dismissed,* 215 F.3d 306 (2000).

***16** Instead, the IVI Group, in various ways, argues that because this Court has jurisdiction to hear the Sureties' claims and has supplemental jurisdiction to hear the IVI Group's cross-claims, that the Court should exercise that jurisdiction and not enforce the forum selection clauses because both the IVI Group and Petrobras are already before this Court and Petrobras's claim that the forum selection clauses should be enforced is "moot." The IVI Group also contends that the clauses contravene a strong public policy in the Second Circuit that supplemental jurisdiction should be exercised where claims under a bond are dependent upon the resolution of cross-claims.

The IVI Group's arguments are without merit. Simply because a court has jurisdiction does not mean that a court should exercise that jurisdiction and refuse to enforce a forum selection clause. *See New Moon Shipping Co. Limited v. Man B & W Diesal AG,* 121 F.3d 24, 28 (2d Cir.1997). Parties cannot agree by contract to oust a federal court of jurisdiction. *See id.; Karl Koch Erecting Co. v. New York Convention Center Dev. Corp.,* 838 F.2d 656, 659 (2d Cir.1988). Dismissal of claims based on a forum selection clause is not based on lack of jurisdiction, but rather is based on the principle that the court should not exercise its jurisdiction because the parties chose by private contract to litigate those cross-claims in another forum. *Bremen,* 407 U.S. at 12 (noting that a forum selection clause does not "oust" a court of jurisdiction but requires the court to consider whether it should "exercise [ ] its jurisdiction to do more than give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement, by specifically enforcing the forum clause"); *see also Karl Koch,* 838 F.2d at 658.

The fact that the Sureties have already established that this Court is a proper forum and venue for resolution of their claims does not mean that this Court should ignore the mandatory forum selection clauses for the disputes between Petrobras/Brasoil and the IVI Group. Indeed, this Court has previously noted, with respect to the P-31 Project, that the forum selection clause in the P-31 Bond designating the Southern District of New York as a permissive forum did not conflict with the exclusive forum selection clause in the P-31 Contract, and that disputes concerning the P-31 Contract could proceed in Brazil while disputes concerning the P-31 Bond could proceed in New York. *See Braspetro,* 1999 WL 307666, at * 18 n. 9. Furthermore, the IVI Group's cross-claims are only permissive in nature, *see* Fed R. Civ. P. 13(g), and courts have evendismissed compulsory counterclaims where the counterclaims were within the scope of a valid forum selection clause despite the existence of jurisdiction and venue. *See Publicis Communication v. True North Communications Inc.,* 132 F.3d 363, 366 (7th Cir.1997) (citing *Karl Koch,* 838 F.2d at 659); *Lombardozzi v. Debroux,* No. 91 Civ. 1001, 1992 WL 246872 (N.D.N.Y. Sept. 23, 1992) (refusing to exercise supplemental jurisdiction over a compulsory counterclaim where the counterclaim implicated an agreement containing a forum selection clause giving another court exclusive jurisdiction).

***17** Moreover, contrary to the IVI Group's assertions, there is no strong public policy favoring resolution of the cross-claims in this forum where the parties chose to litigate elsewhere. The IVI Group cites *Cam-Ful Indus., Inc. v. Fidelity and Deposit Co. of Maryland,* 922 F.2d 156 (2d Cir.1991), for the proposition that a strong public policy favoring the exercise of supplemental jurisdiction exists in this case. [FN11] However, although the Court in *Cam-Ful* concluded that ancillary jurisdiction should have been invoked over the cross-claims at issue in that case, there was no exclusive forum selection clause agreed upon by the parties involved in the cross- claims. *Cam-Ful,* 922 F.2d at 160-161. Indeed, as already discussed

above, there is a strong public policy favoring enforcement of the parties' decision to select the forum of their choice. *See Roby,* 996 F.2d at 1361.

> FN11. With the enactment of 28 U.S.C. § 1367, Congress codified the doctrine of pendent and ancillary jurisdiction under the collective doctrine "supplemental jurisdiction." *See City of Chicago v. International College of Surgeons,* 522 U.S. 156, 164-65 (1997); *Itar- Tass Russian News Agency v. Russian Kurier, Inc.,* 140 F.3d 442, 445-46 (2d Cir.1998). Under § 1367(a), "the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve joinder or intervention of additional parties." In *Cam-Ful,* the Court of Appeals for the Second Circuit did not rely upon supplemental jurisdiction under § 1367 because the complaint in that action was filed prior to December 1, 1990, the effective date of § 1367 and instead used the term "ancillary jurisdiction." *See Cam-Ful,* 922 F.2d at 160. Courts have generally held that "cross-claims under Rule 13(g) fall within the ancillary jurisdiction of the court and need not present independent grounds of federal jurisdiction" and the codification of the doctrine as supplemental jurisdiction under § 1367 has not altered that precedent. *See* 6 Wright, Miller and Kane, Federal Practice and Procedure § 1433 (1990 & 1999 Supp.).

It is possible to conceive of situations where there may be a strong public policy overcoming a forum selection clause, based on the interests of fairness, convenience to the parties, and judicial economy when all of the issues were otherwise being litigated before the court. *Cf. Nippon Fire & Marine Insurance Co. v. M/V Spring Wave,* 92 F.Supp.2d 574, 577 (E.D.La.2000) (declining to enforce a forum selection clause where the same facts and same legal theories would be litigated against the same party by other parties who were not parties to the forum selection clauses). However, in the unusual situation here, IVI and Sade are already suing Petrobras and Brasoil in Brazil and the issues being litigated in Brazil are related to the issues being litigated here. It is clear that there is going to be litigation in both Brazil and the United States resulting in judicial inefficiency and inconvenience whether the forum selection clauses are enforced or not and thus some inefficiency and inconvenience must be tolerated. That inefficiency is a result of the extraordinary complexity of the transactions and the number of agreements involved and the parties' decision to include different forum selection clauses in different agreements.

In this case, given that the parties involved in the cross-claims are, for the most part, Brazilian entities, litigation is already being pursued by IVI and Sade in Brazil, and the will of the parties to the various contracts is carried out to the greatest extent possible by having the IVI Group litigate their claims against Petrobras in Brazil, the IVI Group has not overcome the presumptive validity of the forum selection clauses. [FN12]

> FN12. The IVI Group relies strongly on *Bankers Trust Co. v. Worldwide Transp. Serv.,* 537 F.Supp. 1101 (E.D.Ark.1982) where the court retained jurisdiction over one out of three cross-claims despite the existence of a mandatory forum selection clause because the cross-claim that it refused to dismiss was "inextricably intertwined" with the issues involved in the main complaint. *Bankers Trust,* 537 F.Supp. at 1112. However, *Bankers Trust* is not binding on this Court and, in any event, for the reasons explained above, the interests of efficiency, judicial economy and convenience are not sufficient in this case to overcome the strong presumption in favor of the mandatory forum selection clauses negotiated by the parties.

The IVI Group next argues that Petrobras has waived enforcement of the forum selection clauses because Brasoil affirmatively raised counterclaims in the companion action based on identical facts and circumstances as those forming the basis of the cross-claims and because Petrobras/Brasoil has

participated in extensive mediation sessions and discovery in the two actions. This argument is without merit. Petrobras did not waive the defense by failing to plead it because Petrobras clearly raised the issue of the forum selection clauses in the various contracts as an affirmative defense in its answer to the IVI Group's cross-claims. (Petrobras Cross-Claims Answer at 17.) The fact that Petrobras/Brasoil filed counterclaims in the companion action, in which it was entitled to defend itself, and participated in mediation sessions and discovery did not waive its affirmative defense in this case. *See Rogen v. Memry Corp.,* 886 F.Supp. 393, 396 (S.D.N.Y.1985) (collecting cases). Thus, Petrobras did not waive enforcement of the forum selection clause as a defense to the assertion of the cross-claims in this case.

***18** Finally, the IVI Group argues that the forum selection clause does not encompass the IVI Group's cross-claims. The IVI Group contends that the cross- claims, apart from being directly based on the provisions of the Bonds and the Indemnity Agreements, are premised upon the fact that Petrobras/Brasoil required that the IVI Group perform according to a scope of work and procedure completely different from that originally specified under the various Construction Contracts. In addition, it argues that the cross-claims based upon tort and fraud are not within the scope of the forum selection clauses.

To further the strong public policy in favor of forum selection causes, courts have construed contractual forum selection clauses to encompass claims beyond breach of the contract containing the clause. *See Roby,* 996 F.2d at 1361 ("We ... reject the ... contention that only allegations of contractual violations fall within the scope of the [forum selection] clause [ ]."); *Bense v. Interstate Battery System of America,* 683 F.2d 718,720 (2d Cir.1982) (holding that a forum selection clause that applied to "causes of actions arising directly or indirectly from [the agreement]" covered both breach of contract claims and federal antitrust claims); *see also Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 519-20 (1974) (holding that a forum selection and arbitration clause applying to controversies and claims that "arise out of" a sales contract covered claims for securities violations related to the sale). Whether a forum selection clause encompasses claims beyond breach of contract depends on the plain language of the forum selection clause itself. *Roby,* 996 F.2d at 1361; *Bense,* 683 F.2d at 720.

Judge Stein recently summarized the cases attempting to define when a contractually based forum selection clause includes other claims:

> [a] forum selection clause should not be defeated by artful pleading of claims not based on the contract containing the clause if those claims grow out of the contractual relationship, or if 'the gist' of those claims is a breach of that relationship.... Thus, the circuit courts have held that a contractually-based forum selection clause will also encompass tort claims if the tort claims ultimately depend on the existence of a contractual relationship between the parties, ... or if resolution of the claims relates to interpretation of the contract, ... or if the tort claims involve the same operative facts as a parallel claim for breach of contract....
>
> Regardless of the differences in terminology, one common thread running through these various formulations is the inquiry whether the plaintiff's claims depend on rights and duties that must be analyzed by reference to the contractual relationship.

Direct Mail Prod. Serv. Ltd. v. MBNA Corp., No. 99 Civ. 10550, 2000 WL 1277597, at *6 (S.D.N.Y. September 7, 2000) (internal citations and quotation marks omitted); *see also Hugel v. Corporation of Llyod's,* 999 F.2d 206, 209 (7th Cir.1993) ("Regardless of the duty sought to be enforced in a particular cause of action, if the duty arises from the contract, the forum selection clause governs the action."); *Crescent Int'l, Inc. v. Avatar Comm.,* 857 F.2d 943, 944-945 (3d Cir.1988) (per curiam); *Warnaco Inc. v. VFCorp.,* 844 F.Supp. 940, 947-949 (S.D.N.Y.1994). [FN13]

> FN13. A party may not "circumvent forum selection ... clauses merely by stating claims under laws not recognized by the forum selected in the agreement." *Roby,* 996 F.2d at 1360.

***19** All of the IVI Group's cross-claims fall within the scope of the forum selection clauses contained in the Construction Contracts. [FN14] The forum selection clauses for the Construction Contracts are similar and apply to "any questions arising from the performance of [the particular] Contract." [FN15]

FN14. The facts of this case are distinct from the facts of *S-Fer Int'l, Inc. v. Paladion Partners, Ltd.,* 906 F.Supp. 211, 214 (S.D . N.Y.1995), relied upon by the IVI Group. In that case, the court found that the forum selection clause contained in a lease did not cover tort claims based on fraud in the inducement. *S-Fer,* 906 F.Supp. at 214. The forum selection clause in that case, however, applied to "legal suit[s] or action [s] for enforcement of any obligation contained" in the lease and was thus narrower than the forum selection clauses at issue in this case.

FN15. The P-34 Subcontract forum selection clause actually applies to "any disputes arising" under the Subcontract. The parties, however, do not attempt to differentiate the scope of this clause from the other forum selection clauses at issue and the forum selection clause in the P-34 Subcontract is substantially similar to the clauses in the P-19, P- 31, and P-34 Contracts.

The IVI Group's first cross-claim, for breach of the terms of the performance bonds and the MAC bond and the covenant of good faith and fair dealing, arises from the performance of the P-19 and P-31 Contracts. Whether Petrobras/Brasoil breached the terms of the performance bonds and the covenant of good faith and fair dealing depends on whether Petrobras/Brasoil properly declared that the IVI Group was in default in performing the Construction Contracts and this concerns the IVI Group's rights and duties with respect to performance under those contracts.

It is clear that the IVI Group's Cross-Claims 2 and 3, which allege breaches of the P-19 Contract, the P-31 Contract, the P-34 Contract, and the alleged Consortia/IVI/Petrobras Contract are claims that arise from the performance of the Construction Contracts. Although the Consortia/IVI/Petrobras Contract is allegedly a novation and thus formed a new contract, Cross-Claim 2 depends on the existence of the prior Construction Contracts and resolution of the cross-claim will relate to the interpretation of the Construction Contracts and thus it arises out of the performance of those contracts.

The quantum meruit cross-claim (Cross-Claim 4) alleges that Petrobras/Brasoil imposed untenable conditions on the completion of the Construction Contracts and should be deemed to have repudiated those contracts, entitling the IVI Group to recover the reasonable value of its services. This claim relates to the interpretation of the underlying Construction Contracts and their performance. *See Berrett v. Life Ins. Co. of the Southwest,* 623 F.Supp. 946, 949 (D.Utah 1985) (applying forum selection clause to a quantum meruit claim).

Cross-claim 5, for negligent misrepresentation, alleges that Petrobras/Brasoil misled the IVI Group about the design and scope of the P-19, P-31, and P-34 Projects, negligently misrepresented that the P-19 and P-31 Consortia were in default, and negligently misrepresented that funds could not be made available for the MAC installment payment in May 1997. Resolution of this claim depends on the rights and duties of the parties as set forth in the Construction Contracts and subsequent related agreements and the work performed by the IVI Group and the claim arises from the performance of the P-19 and P-31 Contracts.

The IVI Group's cross-claims for breach of agency (Cross-claim 6) and breach of fiduciary and partnership obligations (Cross-claim 7) also arise from the performance of the Construction Contracts. These claims concern, among other things, the alleged breach by Petrobras/Brasoil of its obligations under the alleged Consortia/IVI/Petrobras Contract by, among other means, failing to continue funding the construction projects. These claim will depend on the interpretation of the original Construction Contracts and the responsibility of the parties under those contracts and the degree, if at all, that the parties agreed to change their obligations under those contracts.

***20** Cross-claim 8, based on a lender liability theory, concerns the extent to which Petrobras/Brasoil improperly took control of the various construction projects and interfered with the IVI Group's contractual performance. This claim arises out of the performance of the Construction Contracts and the rights and duties of the parties.

The IVI Group's tortious interference cross-claim

(Cross-Claim 9) is dependant on and is derivative of the contractual relationship between the IVI Group and Petrobras/Brasoil and relates to whether the parties were in compliance with the contracts. *See, e.g., Hugel,* 999 F.2d at 209 (finding that a forum selection clause applied to a claim of tortious interference with a business relationship); *Druckers', Inc. v. Pioneer Electronics (USA), Inc.,* Civ. A. No. 93-1931, 1993 WL 431162, at *7 (D.N.J. Oct. 20, 1993) (similar).

The IVI Group's fraud claim (Cross-Claim 10) concerns alleged misrepresentations as to Petrobras/Brasoil's intent to honor and perform, among other things, the Construction Contracts and is similar to the IVI Group's claims for breach of contract. The IVI Group's exoneration cross-claim (Cross- Claim 11) and constructive trust cross-claim (Cross-Claim 12) based on unjust enrichment also depend on the rights and duties of the parties to the Construction Contracts and subsequent related agreements. Those claims seek to hold Petrobras/Brasoil responsible for any payments due on the P-19, P- 31, and P-34 Projects and to impose a constructive trust on the revenues from those Projects.

Finally, in an unnumbered cross-claim, the IVI Group includes a claim for subrogation against Petrobras/Brasoil arguing that, to the extent that the IVI Group is held liable to the Sureties, then it should be entitled to any claims the Sureties have against Petrobras/Brasoil. But the basis for any liability by the IVI Group to the Sureties arises out of the IVI Group's performance of the Construction Contracts and the claims by the Sureties against Petrobras/Brasoil are also based on claims of alleged wrongdoing by Petrobras/Brasoil in connection with the alleged interference by Petrobras/Brasoil in the performance by the IVI Group of the Construction Contracts. Thus, any claim for subrogation, to the extent that the IVI Group can maintain such a claim, arises out of the performance of the Construction Contracts and is within the scope of the forum selection clauses.

In sum, Cross-Claims 1-12, along with the IVI Group's subrogation claim against Petrobras/Brasoil, are claims arising from the performance of the P- 19, P-31, and P-34 Contracts and the P-34 Subcontract. All of the claims involve rights and duties that arise out of the Construction Contracts and relate to the performance of the Construction Contracts; the IVI Group's business relationship with Petrobras/Brasoil arose from the Construction Contracts; and the alleged wrongful conduct was made possible principally because of the contractual relationship among the parties and Petrobras/Brasoil's alleged failure to abide by the terms of the Construction Contracts. *See Warnco,* 844 F.Supp. at 949. Thus, the forum selection clauses in the P-19, P-31, and P-34 Contracts and the P-34 Subcontract encompass all of the cross-claims asserted by the IVI Group in this action and the IVI Group's cross-claims are dismissed without prejudice to assertion in Brazil. [FN16]

FN16. Petrobras also contends that the P-34 Contract is unrelated to the action brought by the Sureties on the P-19 and P-31 performance bonds and the IVI Group's claims with respect to the P-34 Project do not meet the requirements of Fed.R.Civ.P. 13(g). Because all of the IVI Group's cross-claims are dismissed on the basis of the forum selection clauses, including those based on the P-34 Project, it is unnecessary to decide this issue.

V.

***21** The defendant Petrobras also moves pursuant to Fed. R. Civ. 12(c) to dismiss Counts 6-11 and 13 of the Sureties' First Amended Complaint. The parties are in dispute over which law should be applied to Counts 6-8, 10-11 and 13. Petrobras argues that it is entitled to judgment on the pleadings because Counts 6-8, 10-11 and 13 arise under the P-19 and P-31 Contracts, are governed by Brazilian law and are not cognizable claims under Brazilian law. The Sureties respond that these claims arise under the P-19 and P-31 Bonds, the MAC Payment Bond and the Indemnity Agreements and that New York law governs all of their claims against Petrobras. With respect to Count 9, the Sureties' claim for tortious interference with contract, the papers submitted by the parties do not dispute that New York law applies. Petrobras, however, contends that Count 9 is barred by the doctrine of collateral estoppel and is otherwise defective.

In this case, jurisdiction over Petrobras exists

pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 et. seq. ("FSIA"). *See Petrobras,* 1999 WL 307642, at *4-10. In cases brought under FSIA, courts apply the choice of law rules of the forum state, in this case, New York. *See Barkanic v. General Admin. of Civil Aviation of the People's Republic of China,* 923 F.2d 957, 959-60 (2d Cir.1991); *see also Brink's Ltd. v. South African Airways,* 93 F.3d 1022, 1030 (2d Cir.1996). The claims as to which the proper law to be applied is disputed, Counts 6-8, 10-11 and 13, are common law claims that are contractual in nature because they arise out of relationships formed in the P-19 and P-31 Contracts, the P-19 and P-31 Bonds, the MAC Payment Bond, and/or the Indemnity Agreements. In *Brink's,* the Court of Appeals for the Second Circuit explained the approach used by New York courts:

> In contract cases, New York courts now apply a "center of gravity" or "grouping of contacts" approach. Under this approach, courts may consider a spectrum of significant contacts, including the place of contracting, the places of negotiation and performance, the location of the subject matter, and the domicile or place of business of the contracting parties. New York courts may also consider public policy "where the policies underlying conflicting laws in a contract dispute are readily identifiable and reflect strong governmental interests." The traditional choice of law factors, the places of contracting and performance, are given the heaviest weight in this analysis.

Brink's, 93 F.3d at 1030-31 (citations omitted); *see also APC Commodity Corp. v. Ram Dis Ticaret A.S.,* 965 F.Supp. 461, 467 (S.D.N.Y.1997).

At this stage in the proceedings, it is not possible for the Court to determine from the current factual record whether Brazilian or New York law applies to Counts 6-8, 10-11 and 13. Petrobras argues that the P-19 and P-31 Contracts contain choice of law clauses providing that the contracts are governed by Brazilian law, the contracts were negotiated, executed and performed in Brazil, the parties to the P-19 and P-31 Contracts are primarily Brazilian entities, and thus Brazilian law applies to all of the Sureties' claims because the legal relationships originated in Brazil. However, the majority of the Sureties' claims, namely Counts 6-8, 11 and 13, are common law claims of indemnity, exoneration, and alter ego liability that arise out of and relate to the P-19 and P-31 Bonds, the MAC Payment Bond, and the Indemnity Agreements because they are efforts to hold Petrobras, a Brazilian entity, to the provisions of the various bonds and the Indemnity Agreements, even though Petrobras is not a signatory to the bonds or the Indemnity Agreements, based on an alleged partnership or joint venture between Petrobras and the members of the construction consortia for the P-19 and P-31 Projects, principally Brazilian entities, and on the alleged domination by Petrobras of IVI, Sade and the construction consortia for the respective projects. Although the entities at issue are principally Brazilian entities and performance of the P-19 and P-31 Contracts occurred in Brazil, the Sureties are United States corporations and AHAC is incorporated under the laws of New York, the bonds are all expressed in United States dollars and were issued in New York, each of the Indemnity Agreements provides that it shall be interpreted under New York law, the limits of indemnity are stated in United States dollars, and, to the extent that the Sureties were required to pay under the bonds, their performance would have occurred at least in part in the United States.

***22** It is unclear whether Brazilian law or New York law would apply to Counts 6-8, 10-11, and 13 because there are insufficient facts available to resolve how a New York court would resolve the "center of gravity" or "grouping of contacts" for these claims, particularly in view of the fact that it is unclear from the pleadings where the alleged partnership and/or alter ego status arose which is critical to the claims. The factual record regarding Counts 6-8, 10-11, and 13 is not yet sufficiently developed to allow a reasoned decision with respect to what law should apply where a party is alleging there is a partnership or alter ego relationship such that a Brazilian entity can be subject to the terms of the Indemnity Agreements and/or performance bonds interpreted under New York law to which that entity is not a signatory. Further factual development is therefore required to determine the choice of law issue. *See First Wall Street Capital Corp. v. Int'l Property Corp., Ltd.,* No. 97 Civ. 702, 1998 WL 823619, at *7 (S.D.N.Y. Nov. 25, 1998); *Employers Mut. Casualty Co. v. Key Pharmaceuticals,* 91 Civ. 1630, 1992 WL 8712, at *8 (S.D.N.Y. Jan. 16, 1992). In addition, the pleadings and documents incorporated by reference do not indicate where the P-19 and P-31 Bonds, and the MAC Payment Bond were negotiated and executed, thus presenting factual issues the

resolution of which may determine whether Brazilian or New York law applies to claims related to the bonds. Thus, to the extent that any of the Sureties' claims arise out of the parties' obligations under the P-19 Bond, the P- 31 Bond, and/or the MAC Payment Bond, and the Indemnity Agreements, the Court cannot determine which law governs those claims until discovery is completed and the facts are more fully developed.

Even if Brazilian law were to apply to Counts 6-8, 10-11, and 13, the parties have provided affidavits disputing what the relevant Brazilian law is to be applied. At this time, Brazilian law has not been sufficiently developed for the Court and resolution of the disputes over Brazilian law will require a hearing. While issues of foreign law are matters of law for the Court to determine, *see* Fed.R.Civ.P. 44.1, the procedures for determining that law are within the court's discretion. *See, e.g., Carbotrade S.P.A. v. Bureau Veritas,* No. 92 Civ. 1459, 1998 WL 397847, at *2 (S.D.N.Y. July 16, 1998). Given the sharp conflict in the affidavits by Brazilian law experts and the complexity of the issues, the Court would hold a hearing to determine Brazilian law to be applied.

Moreover the validity of the claims under Brazilian law, if Brazilian law applies, depends upon the factual development of those claims and there are significant issues of fact that cannot be decided on a motion to dismiss. For example, Petrobras argues that Counts 6-7, 11 and 13 are not recognized under Brazilian law because Petrobras, as an arm of the Brazilian government, is subject to Law No. 8666/93, which requires that all of Petrobras's contracts must be in writing to be enforceable. The Sureties contend that Brazil recognizes de facto partnerships and that, under Brazilian law, Petrobras is a mixed capital company and is governed by the private law system and is not subject to the section of Law No. 8666/93 that requires a written agreement. It is plain that there are factual issues in dispute as to Petrobras's status--whether, under Brazilian law, it is considered an arm of the government subject to the requirement that all agreements be in writing or whether its status is such that it may participate in a de facto partnership. Similarly, there are factual issues with respect to Count 10 regarding the circumstances under which the alleged Consortia/IVI/Petrobras Contract arose that cannot be decided on a motion to dismiss.

***23** With respect to Count 9, the Sureties' tortious interference claim, the parties do not dispute that New York law should be applied. Count 9 alleges that Petrobras tortiously induced Brasoil to breach the IVI Receivables Agreement and the Brasoil Payment Obligation and tortiously induced IVI to breach its obligations to MAC under the MAC Agreements and interfered with IVI's tender of the Tendered Equipment, thus interfering with the Sureties' suretyship rights. Petrobras contends that Count 9 is barred by the doctrine of collateral estoppel based on the State Court Action and, in the alternative, is otherwise defective.

Collateral estoppel does not preclude the Sureties from raising their tortious interference claim because the issues in the State Court Action and in Count 9 in this case are not identical and thus there is no identity of issues. [FN17] "Whether the issues in the two proceedings are identical depends, however, not upon how one or all of the parties characterize them, but on what facts are determinative of each proceeding in light of the substantive law principles, common law or statutory, governing each." *Capital Tel. Co., Inc. v. Pattersonville Tel. Co., Inc.,* 436 N.E.2d 461, 464 (N.Y.1982). "To maintain a successful cause of action for tortious interference with contract under New York law, a plaintiff must allege andprove the existence of a valid contract and damages caused by the defendant's knowing and intentional interference with that contract without reasonable justification." *Jews for Jesus, Inc. v. Jewish Community Relations Counsel of New York, Inc.,* 968 F.2d 286, 292 (2d Cir.1992); *see also Int'l Minerals & Resources, S.A. v. Pappas,* 96 F.3d 586, 595 (2d Cir.1996); *Kronos, Inc. v. AVX Corp.,* 612 N.E.2d 289, 292 (N.Y.1993) .

> FN17. The Sureties argue that resolution of the collateral estoppel issue is inappropriate on a Rule 12(c) motion and should be decided on a summary judgment motion. A collateral estoppel defense, however, may be analyzed on a Rule 12(c) motion where all the relevant facts are set forth in the complaint and in matters of which the Court may take judicial notice. *Cf. Conopco, Inc., v. Roll Int'l,* 231 F.3d 82, 86-87 (2d Cir.2000) ("Dismissal under Fed.R.Civ.P. 12(b)(6) is appropriate when a defendant raises claim preclusion ... as an

> affirmative defense and it is clear from the face of the complaint, and matters of which the court may take judicial notice, that the plaintiff's claims are barred as a matter of law."); *Day v. Moscow,* 955 F.2d 807, 811 (2d Cir.1992) (same). As discussed, above, the Court may take judicial notice of the relevant pleadings, motion papers, orders, and judgments in the State Court Action and it is not necessary to convert Petrobras's Rule 12(c) motion to a motion for summary judgment. *See Marchon Eyewear,* 1999 WL 184107, at *2.

The finding of the state trial court that there was insufficient evidence to establish that MAC conspired with Petrobras to create a claim under the MAC Payment Bond does not preclude a finding that Petrobras tortiously induced Brasoil to breach the IVI Receivables Agreement and the Brasoil Payment Obligation and tortiously induced IVI to breach its obligations to MAC under the MAC Agreements and interfered with IVI's tender of the Tendered Equipment. The Sureties tortious interference claim focuses on Petrobras's actions and a finding of a conspiracy between MAC and Petrobras is not necessary to the claim of tortious interference. In Count 9 the Sureties have not alleged that MAC breached any obligations under the MAC Agreements or the MAC Payment Bond or that Petrobras induced MAC to breach any such obligations, nor do they allege a conspiracy between MAC and Petrobras. Rather, the Sureties allege that Petrobras interfered with Brasoil's and IVI's obligations under certain agreements, causing them to breach those agreements. Thus, there is no identity of issue between the conspiracy issue litigated in the State Court Action and the Sureties' third-party claim of tortious interference and collateral estoppel does not bar this claim.

***24** Petrobras also argues that Count 9 is otherwise defective to the extent that it asserts a tortious interference claim against Petrobras for interfering with the contracts that Brasoil entered into with IVI and/or the Sureties. Petrobras contends that as Brasoil's parent corporation and agent, Petrobras had a right to interfere with the contract of its subsidiary to protect its economic interests and Petrobras contends that there is a defense of economic justification. To determine whether interference with a contract was justified the New York Courts have adopted an approach that:

> requires a balancing of factors to determine whether the interference was justified under the circumstances of the particular case. These factors include: the nature of the defendant's conduct, the defendant's motive, the interests of the plaintiff with which the defendant interferes, the interests the defendant seeks to advance, the social interests at stake, the proximity of the defendant's conduct to the interference, and the relations between the parties.

Jews for Jesus, 968 F.2d at 292; *see also Int'l Minerals,* 96 F.3d at 595. Petrobras, as a parent of Brasoil has an economic interest in Brasoil sufficient to support a defense of economic justification. *See éFelson v. Sol Caf Mgr.,* 249 N.E.2d 459, 461 (N.Y.1969) (finding that the sole stockholder of a corporation had an existing economic interest to protect, and was privileged to interfere with a contract between the plaintiff and the Corporation); *see also Foster v. Churchill,* 665 N.E.2d 153, 156-57 (N.Y.1996); *WMW Machinery Co., Inc. v. Koerber AG,* 658 N .Y.S.2d 385, 386 (App.Div.1997). To impose liability for tortious interference in spite of a defense of economic interest a plaintiff must show "either malice on the one hand, or fraudulent or illegal means on the other." *Foster,* 665 N.E.2d at 157; *Felsen,* 249 N.E.2d at 461. However, it cannot be determined on this motion to dismiss whether Petrobras acted out of its own economic justification and whether the Sureties will be able to overcome any such defense. Therefore, Count 9 cannot be dismissed on the pleadings. *See, e.g., Ives v. Guilford Mills, Inc.,* 3 F.Supp.2d 191, 198 (N.D.N.Y.1998).

Accordingly, Petrobras's motion to dismiss Counts 6-11 and 13 of the First Amended Complaint is denied.

VI.

The IVI Group moves pursuant to Fed.R.Civ.P. 42(a) to consolidate this action with *United States Fidelity and Guaranty Co. v. Braspetro Oil Serv. Co.,* No. 97 Civ. 6124, for all purposes. The two cases are presently consolidated for purposes of discovery. Rule 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions...." Fed.R.Civ.P. 42(a). Trial courts retain "broad discretion to determine whether

consolidation is appropriate." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1284-85 (2d Cir.1990). The IVI Group's motion to consolidate is plainly premature at this stage, before pre-trial proceedings have been completed and the prospective evidence in both cases is clear. Thus, the motion to consolidate is denied without prejudice to renewal after the close of discovery and after decision of any dispositive motions.

CONCLUSION

***25** For the reasons explained above:

1. MAC's motion to dismiss IVI's third-party complaint is denied.
2. Petrobras/Brasoil's motion to dismiss the IVI Group's cross-claims is granted without prejudice to the assertion of those claims in Brazil.
3. Petrobras's motion to dismiss Counts 6-11 and 13 is denied.
4. The IVI Group's cross-motion to consolidate this action with the companion action, 97 Civ. 6124(JGK) is denied without prejudice to renewal after the close of discovery and after decision of any dispositive motions.

SO ORDERED.

2001 WL 300735, 2001 WL 300735 (S.D.N.Y.)

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